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No. 87-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

ALEXIA MORRISON, INDEPENDENT COUNSEL,
Appellant,

v.

THEODORE B. OLSON, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR APPELLANT

ALEXIA MORRISON
Independent Counsel
(Counsel of Record)
EARL C. DUDLEY, JR.
RICHARD C. OTTO
Deputy Independent Counsel
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

LOUIS F. CLAIBORNE
Appellate Counsel
Counsel for Appellant

March 9, 1988

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QUESTIONS PRESENTED

1. Whether a federal court may, consistent with the limitations of Article III of the Constitution and the prudential considerations governing the exercise of judicial power, entertain a challenge by the recipient of a grand jury subpoena to the constitutionality of the statute empowering the prosecutor conducting the investigation to proceed.

2. Whether an independent counsel appointed pursuant to Title VI of the Ethics in Government Act, 28 U.S.C. §§ 49, 591 *et seq.*, to conduct a single criminal investigation with precisely defined prosecutorial jurisdiction is a "principal" officer of the United States whose appointment is required by the Appointments Clause, U.S. Const., art. II, § 2, cl. 2, to be made by the President with the advice and consent of the Senate.

3. Whether, assuming such an independent counsel is an "inferior" officer within the meaning of the Appointments Clause, her appointment by a court of law is so "incongruous" as to transgress either the intended boundaries of the Clause or the limitations on judicial activity imposed by Article III.

4. Whether the separation of powers principle is offended by a statute empowering a court of law to appoint such an independent counsel and define her prosecutorial jurisdiction and insulating the conduct of the office from Executive Branch control, *inter alia*, by limiting the Attorney General's power of removal.

PARTIES

The appellant is Alexia Morrison, independent counsel. Appellees are Theodore B. Olson, Edward C. Schmults and Carol E. Dinkins.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
1. The Background of the Olson Investigation	2
2. The Statutory Scheme	3
3. Proceedings Under the Act in the Olson Investigation	8
4. The Litigation of the Constitutional Issues	11
SUMMARY OF ARGUMENT	12
ARGUMENT	15
INTRODUCTION	15
I. APPELLEES WERE NOT ENTITLED TO CHALLENGE THE CONSTITUTIONALITY OF TITLE VI IN RESPONSE TO THE GRAND JURY SUBPOENAS	24
II. THE APPOINTMENTS CLAUSE AUTHORIZES CONGRESS TO VEST IN A "COURT OF LAW" THE POWER TO APPOINT INDEPENDENT COUNSELS AND TO DEFINE THEIR TEMPORARY PROSECUTORIAL JURISDICTION	29

TABLE OF CONTENTS—Continued

	Page
A. *Congress Properly Denominated Independent Counsels "Inferior Officers."*	30
B. *There Is No Unconstitutional "Incongruity" in Lodging the Appointment of a Temporary Prosecuting Official in a Court of Law*	36
C. *The Powers Granted to the Special Division by Title VI Do Not Contravene the Limitations of Article III*	43
III. TITLE VI DOES NOT VIOLATE THE SEPARATION OF POWERS PRINCIPLE	46
A. *Title VI Involves No Aggrandizement of Congressional or Judicial Power at the Expense of the Presidency*	46
B. *Title VI Does Not Impermissibly Interfere With the Operation of the Executive Branch*	48
1. The Act Does Not Prevent the Executive Branch From Accomplishing Its Constitutionally Assigned Functions	49
2. Any Impact on Executive Branch Powers Is Justified by an Overriding Need To Promote an Objective Within the Constitutional Authority of Congress	56
C. *Title VI Poses No Threat to Individual Liberties*	57
CONCLUSION	60

TABLE OF AUTHORITIES

CASES	Page
American Federation of Gov't Employees v. O'Connor, 747 F.2d 748 (D.C. Cir. 1984)	29
Auffmordt v. Hedden, 137 U.S. 310 (1890)	30
Banzhaf v. Smith, 737 F.2d 1167 (D.C. Cir. 1984)	18
Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986)	28, 29
Berger v. United States, 295 U.S. 78 (1935)	41, 57
Blair v. United States, 250 U.S. 273 (1919)	12, 13, 24-28
Bowsher v. Synar, 106 S. Ct. 3181 (1986)	22, 36, 38, 47, 50, 55
Branzburg v. Hayes, 408 U.S. 665 (1972)	26
Buckley v. Valeo, 424 U.S. 1 (1976)	15, 30, 33, 38, 44, 47, 50, 56
Butterworth v. United States ex rel. Hoe, 112 U.S. 50 (1884)	51
CFTC v. Schor, 106 S. Ct. 3245 (1986)	40, 48-49
Cobbledick v. United States, 309 U.S. 323 (1940)	26
Cort v. Ash, 422 U.S. 66 (1975)	50
Costello v. United States, 350 U.S. 359 (1956)	26
Deaver v. Seymour, 656 F. Supp. 900 (D.D.C.), *aff'd*, 822 F.2d 66 (D.C. Cir.), *stay denied*, 107 S. Ct. 3177, *cert. denied*, 108 S. Ct. 99 (1987)	27
Dellums v. Smith, 797 F.2d 817 (9th Cir. 1986)	18
District of Columbia v. Air Florida, Inc., 750 F.2d 1077 (D.C. Cir. 1984)	29
Duke City Lumber Co. v. Butz, 539 F.2d 220 (D.C. Cir. 1976)	29
Ex parte Garland, 71 U.S. 333 (1867)	19
Ex parte Hennen, 38 U.S. (13 Pet.) 230 (1839)	37-38
Ex parte Siebold, 100 U.S. 371 (1880)	35, 37-40
Flast v. Cohen, 392 U.S. 83 (1968)	28
Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931)	38
Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792)	44
Hobson v. Hansen, 265 F. Supp. 902 (D.D.C. 1967)	34, 40
Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981)	25

TABLE OF AUTHORITIES—Continued

	Page
Humphrey's Executor v. United States, 295 U.S. 602 (1935)	50-52, 55
ICC v. Chatsworth Coop. Marketing Ass'n, 347 F.2d 821 (7th Cir. 1965)	49-50
In re Oliver, 333 U.S. 257 (1948)	43
In re Olson, 818 F.2d 34 (D.C. Cir. Indep. Couns. Div. 1987)	6, 10, 11, 16, 18, 19, 33
In re Sealed Case, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 108 S. Ct. 753 (1988)	26, 34
In re Sealed Case, 827 F.2d 776 (D.C. Cir. 1987)	12, 26, 28
In re Sealed Case, 832 F.2d 1268 (D.C. Cir. 1987)	58
INS v. Chadha, 462 U.S. 919 (1983)	47
Jenkins v. McKeithen, 395 U.S. 411 (1969)	29
Kendall v. United States, 37 U.S. (12 Pet.) 524 (1838)	49, 51
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)	15
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	49, 51
McGrain v. Daugherty, 273 U.S. 135 (1927)	48
Myers v. United States, 272 U.S. 52 (1926)	47, 50, 51, 54, 55
Nathan v. Smith, 737 F.2d 1069 (D.C. Cir. 1984)	18
Nat'l Treasury Employees Union v. Nixon, 492 F.2d 584 (D.C. Cir. 1974)	49
Nixon v. Administrator of General Services, 433 U.S. 425 (1977)	49, 54
NLRB v. Catholic Bishop, 440 U.S. 490 (1979)	15
North v. Walsh, 656 F. Supp. 414 (D.D.C. 1987)	27
Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982)	47
Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc., 725 F.2d 537 (9th Cir.) (*en banc*) (Kennedy, J.), *cert. denied*, 469 U.S. 821 (1984)	45
Palmore v. United States, 411 U.S. 389 (1973)	44
Pennell v. City of San Jose, 108 S. Ct. 849 (1988)	25
Regional Rail Reorganization Cases, 419 U.S. 102 (1974)	29

TABLE OF AUTHORITIES—Continued

	Page
Rice v. Ames, 180 U.S. 371 (1901)	34
Schick v. Reed, 419 U.S. 256 (1974)	19
United Public Workers v. Mitchell, 330 U.S. 75 (1947)	28-29
United States v. Calandra, 414 U.S. 338 (1974)	26
United States v. Cox, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965)	48, 52
United States v. Curtis-Wright Export Corp., 299 U.S. 304 (1936)	51
United States v. Deaver, No. 87-3028, D.C. Cir., June 15, 1987, *cert. denied*, 108 S.Ct. 99 (1987)	27
United States v. Deaver, Crim. No. 87-096 (D.D.C. June 23, 1982)	59
United States v. Dionisio, 410 U.S. 1 (1973)	26
United States v. Eaton, 169 U.S. 331 (1898)	35
United States v. Ferreira, 54 U.S. (13 How.) 40 (1851)	44
United States v. Germaine, 99 U.S. 508 (1879)	30, 31, 34
United States v. House of Representatives, 556 F. Supp. 150 (D.D.C. 1983)	2
United States v. Nixon, 418 U.S. 683 (1974)	18, 41, 52, 56
United States v. Perkins, 116 U.S. 483 (1886)	55
United States v. Ryan, 402 U.S. 530 (1971)	26-28
United States v. Solomon, 216 F. Supp. 835 (S.D.N.Y. 1963)	34, 40, 43, 44
United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943)	51
Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464 (1982)	16, 25
Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985)	17
Warth v. Seldin, 422 U.S. 490 (1975)	29
Wayte v. United States, 470 U.S. 598 (1985)	21
Wiener v. United States, 357 U.S. 349 (1958)	47, 55

TABLE OF AUTHORITIES—Continued

Page

Young v. United States ex rel. Vuitton et Fils S.A., 107 S. Ct. 2124 (1987) 40, 42, 43, 45, 57, 60
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) 47, 51

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS

28 C.F.R. Part 600; 52 Fed. Reg. 7270 (1987) 6, 18, 54
2 U.S.C. § 60-1 (b) (2) 36
2 U.S.C. § 136 39
2 U.S.C. § 701 (e) 36, 38, 39
5 U.S.C. §§ 1201-1206 50
15 U.S.C. § 15 50
15 U.S.C. § 45 50
15 U.S.C. §§ 77*s*-77*u* 50
18 U.S.C. § 287 51
18 U.S.C. § 1001 10
18 U.S.C. § 1505 10
18 U.S.C. § 1964 (c) 50
18 U.S.C. § 2516 ..... 6, 45
18 U.S.C. § 2518 45
18 U.S.C. §§ 4202-4203 50
28 U.S.C. § 49 ..... 5, 43
28 U.S.C. § 49 (f) 6
Title VI, of the Ethics in Government Act, 28 U.S.C. §§ 49, 591 et seq. 2, 3
28 U.S.C. § 591 (a) 4
28 U.S.C. § 591 (b) 4
28 U.S.C. § 591 (c) 4
28 U.S.C. § 592 (a) (1) 4
28 U.S.C. § 592 (b) (1) 5, 10, 18-19, 22
28 U.S.C. § 592 (c) (1) 5
28 U.S.C. § 592 (d) (1) 5
28 U.S.C. § 592 (d) (2) 5
28 U.S.C. § 592 (e) 5
28 U.S.C. § 593 (b) 5, 21, 22, 44
28 U.S.C. § 593 (c) 5
28 U.S.C. § 593 (e) 5
28 U.S.C. § 594 33

TABLE OF AUTHORITIES—Continued

Page

28 U.S.C. § 594 (a) 6
28 U.S.C. § 594 (b) 33
28 U.S.C. § 594 (c) 6
28 U.S.C. § 594 (d) 6, 21
28 U.S.C. § 594 (e) 5, 6, 10
28 U.S.C. § 594 (f) 7, 20
28 U.S.C. § 594 (g) 7
28 U.S.C. § 595 (a) 8, 47
28 U.S.C. § 595 (b) (1) 7
28 U.S.C. § 595 (b) (2) 7
28 U.S.C. § 595 (b) (3) 7
28 U.S.C. § 595 (c) 8
28 U.S.C. § 595 (d) 8, 47
28 U.S.C. § 595 (e) 8
28 U.S.C. § 596 (a) (1) 7, 23, 36, 47
28 U.S.C. § 596 (a) (3) 7, 21, 22, 23, 36, 58
28 U.S.C. § 596 (b) (1) 8
28 U.S.C. § 596 (b) (2) 8, 21, 23, 45, 48
28 U.S.C. § 597 (a) 6
28 U.S.C. § 1252 1
28 U.S.C. § 1826 (a) 11
31 U.S.C. § 703 (e) (1) 36
31 U.S.C. § 3730 (b) (1) 51
40 U.S.C. § 162 ..... 36, 39
44 U.S.C. § 301 39
45 U.S.C. §§ 231f (a), 355 (f), (g) 50
50 U.S.C. §§ 1217-1218 50
Fed. R. Crim. P. 42 45
Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 67 41
Act of Sept. 23, 1789, ch. 18, 1 Stat. 72 41
Act of Mar. 2, 1799, ch. 38, 1 Stat. 729 41
Act of Mar. 3, 1863, ch. 93, § 2, 12 Stat. 768 40
Act of March 3, 1789, ch. 20, §§ 1-3, 1 Stat. 512 53
Judiciary Act of Sept. 24, 1789, ch. 20, 53, 1 Stat. 73 ..... 41, 53
Pub. L. No. 95-521, 92 Stat. 1867 (1978) 3
Pub. L. No. 97-409, 96 Stat. 2039 (1983) 4
Pub. L. No. 100-191, 101 Stat. 1293 (1987) 4, 7

TABLE OF AUTHORITIES—Continued

	Page
H.J. Res. 160, 68th Cong., 1st Sess., 43 Stat. 16 (1924)	17-18
U.S. Const., Art. 1, § 5, cl. 1	38
U.S. Const., Art. I, § 8, cl. 9	32
U.S. Const., Art. II, § 2, cl. 1	19
U.S. Const., Art. II, § 2, cl. 2	2, 11, 12, 13, 29-43, 52
U.S. Const., Art. II, § 3	12
U.S. Const., Art. III	2, 11, 12, 13, 28, 43-46
U.S. Const., Art. III, § 1	32
U.S. Const., Art. III, § 2, cl. 2	23
CONGRESSIONAL DOCUMENTS	
H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. 37 (1987)	23
H.R. Rep. No. 435, 99th Cong., 1st Sess. (1985)	3
S. Rep. No. 170, 95th Cong., 1st Sess. (1977)	43
S. Rep. No. 496, 97th Cong., 2d Sess. (1982)	4, 17, 18, 23
Annals of Congress (1834)	32, 42, 51
Journal of the Senate, 1st Sess. (1820)	42
Public Officials Integrity Act of 1977: Hearings on S. 555 Before the Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess. (1977) (testimony of Acting Ass't Atty. Gen. John M. Harmon)	53
TEXTS	
M. Farrand, *The Records of the Federal Convention, 1787* (rev. ed. 1911)	31, 32
S. Johnson, *A Dictionary of the English Language* (1785)	35
Webster's Third New International Dictionary ((unabridged ed. 1981)	35
R. Jackson, *The Machinery of Justice in England* (7th ed. 1977)	52
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TABLE OF AUTHORITIES—Continued

	Page
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L. Huston, *Roles of the Attorney General* (1968)	41-42
L. White, *The Federalists: A Study in Administrative History* (1948)	52
Z. Swift, *Digest of the Laws of the State of Connecticut* (1823 ed.)	41
Nat'l Ass'n of Attorneys General, *Powers, Duties and Operations of State Attorneys General* (1977)	41
LAW REVIEW ARTICLES	
Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49 (1923)	41-42
OTHER SOURCES	
Analysis & Recommendations Concerning the Report of the House Judiciary Committee, Public Integrity Section, April 4, 1986	8
Letter, Alexia Morrison to Edwin Meese III, November 14, 1986	10
Letter, Arnold I. Burns to Alexia Morrison, December 17, 1986	10
Memorandum, William F. Weld to Attorney General, April 4, 1986	9
Memorandum, John C. Keeney to William F. Weld, April 4, 1986	9
Order of April 23, 1986, No. 86-1, D.C. Cir. Indep. Couns. Div.	10
Report of the Attorney General Pursuant to 28 U.S.C. § 592(c)(1) Regarding Allegations Against Department of Justice Officials in the United States House Judiciary Committee Report, April 10, 1986	9
14 Weekly Comp. Pres. Doc. 1855 (Oct. 26, 1978)	54
23 Weekly Comp. Pres. Doc. 1526 (Dec. 15, 1987)	18

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BRIEF FOR APPELLANT

OPINIONS BELOW

The opinions of the court of appeals (J.S. App. 1a-128a) are not yet reported. The opinion of the district court (J.S. App. 129a-39a) is reported at 665 F. Supp. 56.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1988. The notice of appeal and the jurisdictional statement were filed on February 1, 1988. This Court noted probable jurisdiction on February 22, 1988. The jurisdiction of this Court rests upon 28 U.S.C. § 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. II, § 2, cl. 2, and art. III are set forth in the Appendix hereto. Title VI of the Ethics in Government Act of 1978, as amended by Pub. L. No. 97-409, 96 Stat. 2039 (1983), 28 U.S.C. §§ 591-599 is set forth in the Appendix to the Jurisdictional Statement. Those sections of the Act amended in 1987 with immediate effect by Pub. L. No. 100-191, 101 Stat. 1293 (1987), are set forth in the Appendix hereto.

STATEMENT OF THE CASE

1. The Background of the Olson Investigation

In 1982 two Subcommittees of the House of Representatives subpoenaed documents from the Environmental Protection Agency. Acting on the advice of the Department of Justice, the President ordered the Administrator of EPA to invoke executive privilege to withhold certain of the documents, on the ground that they contained "enforcement sensitive" information whose release could imperil ongoing administrative and judicial proceedings. The Administrator obeyed the President's order.

The House voted to hold the Administrator in contempt. The United States Attorney took no steps to prosecute the contempt, and the Department sued the House for a declaration that the claim of privilege was valid.[1]

It emerged that certain of the withheld documents contained evidence of political manipulation of the "Superfund" hazardous waste site clean-up program. The executive privilege claim was subsequently abandoned, the Administrator resigned, and one high-level EPA official was convicted of making a false statement.

The House Judiciary Committee undertook an investigation of the Justice Department's role in the EPA

[1] The district court dismissed the action. *See United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

documents controversy. During that investigation, appellee Theodore B. Olson, then Assistant Attorney General for the Office of Legal Counsel, testified before the Subcommittee on Monopolies and Commercial Law on March 10, 1983. Both before and after that testimony, the Department produced documents responsive to the Committee's requests. It withheld from production both handwritten notes of participants in the documents controversy and chronologies prepared within the Department, without informing the Committee that it was doing so. In April 1984 the Committee learned of the existence of the notes and chronologies, and they were turned over several months later.

The Committee published an extensive report of its investigation on December 4, 1985.[2] The report questioned the truthfulness of Mr. Olson's testimony in a number of respects. It also suggested that appellees Edward C. Schmults and Carol E. Dinkins, at the time of these events Deputy Attorney General and Assistant Attorney General for the Lands and Natural Resources Division respectively, may have engaged in acts, including the withholding of the notes and chronologies, that obstructed the Committee's investigation. Committee Chairman Peter W. Rodino, Jr., forwarded the report to Attorney General Edwin Meese III on December 12, 1985, with a formal request that the latter seek the appointment of an independent counsel under Title VI of the Ethics in Government Act, 28 U.S.C. §§ 49, 591 *et seq.*, to investigate the Committee's allegations.

2. The Statutory Scheme

Title VI was first enacted in 1978,[3] in immediate response to the Watergate experience, but more broadly in response to repeated historical demonstrations that public confidence in the integrity of law enforcement is

[2] *See* H.R. Rep. No. 435, 99th Cong., 1st Sess. (1985).

[3] *See* Pub. L. No. 95-521, 92 Stat. 1867 (1978).

eroded when an Administration is faced with allegations of serious criminal misconduct by its own highly placed officials.[4] It has been reenacted twice with amendments responsive to experience under its provisions, most recently in December 1987.[5]

The Act requires the Attorney General, upon receipt of "information that [he] determines is sufficient to constitute grounds to investigate that any person covered by the Act has engaged in [serious criminal conduct]," [6] to conduct "such preliminary investigation of the matter as the Attorney General deems appropriate." 28 U.S.C. § 592(a)(1). The compass of the Act is quite narrow: it applies only to allegations involving the President, the Vice President, cabinet rank officers, highly placed members of the Executive Office of the President and the Department of Justice, the Director and Deputy Director of Central Intelligence, the Commissioner of Internal Revenue and the top officials of the President's national political campaign.[7]

If the Attorney General determines following the preliminary investigation that "there are no reasonable grounds to believe that further investigation or prosecution is warranted," he is required to notify the Special Division of the United States Court of Appeals for the District of Columbia Circuit for the Purpose of Appoint-

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[4] *See, e.g.*, S. Rep. No. 496, 97th Cong., 2d Sess. 4-5 (1982).

[5] *See* Pub. L. No. 97-409, 96 Stat. 2039 (1983); Pub. L. No. 100-191, 101 Stat. 1293 (1987).

[6] The statute applies to alleged violations "of any Federal criminal law other than a violation constituting a Class B or C misdemeanor or an infraction." 28 U.S.C. § 591(a).

[7] *See* 28 U.S.C. § 591(b). The Attorney General may also invoke the procedures of the Act with respect to any other person if he determines that "the investigation of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial or political conflict of interest." 28 U.S.C. § 591(c).

ing Independent Counsels,[8] which then has "no power to appoint [an] independent counsel." 28 U.S.C. § 592(b)(1). If, on the other hand, the Attorney General determines following the preliminary investigation that there are "reasonable grounds to believe that further investigation or prosecution is warranted," he is directed to apply to the Division for the appointment of an independent counsel. 28 U.S.C. § 592(c)(1).

In his application the Attorney General must supply "sufficient information to assist the division of the court to select [an] independent counsel and to define that independent counsel's prosecutorial jurisdiction." [9] 28 U.S.C. § 592(d)(1). The application and accompanying materials are automatically sealed, subject to the order of the Division. 28 U.S.C. § 592(d)(2). Once an independent counsel has been appointed, the Attorney General may, on his own determination, 28 U.S.C. § 592(e), or at the request of the independent counsel, 28 U.S.C. § 594(e), refer to the independent counsel additional matters related to the initial investigation.

The powers of the Division under the statute are strictly circumscribed. Upon application by the Attorney General, § 593(b) authorizes the Division to "appoint an appropriate independent counsel and . . . define that independent counsel's prosecutorial jurisdiction" within the limits imposed by § 592(b)(1). The Division is also empowered to fill vacancies in the office of independent counsel, 28 U.S.C. § 593(e), and to expand the jurisdiction of an existing independent counsel upon application by the Attorney General, 28 U.S.C. § 593(c), but it may not

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[8] The Division is established by 28 U.S.C. § 49. Its members are designated by the Chief Justice from among Senior Circuit Judges.

[9] While the statute does not require it, the practice of the Department is to submit with the application a proposed statement of the independent counsel's jurisdiction.

grant additional jurisdiction over matters rejected by the Attorney General, *In re Olson*, 818 F.2d 34, 47 (D.C. Cir. Indep. Couns. Div. 1987).[10] The Division has no control over an independent counsel's conduct of the investigation or prosecution, and its members are ineligible to sit in review on any matter "which involves such independent counsel . . . or . . . the exercise of such independent counsel's official duties," 28 U.S.C. § 49(f).

An independent counsel has "with respect to all matters in such independent counsel's prosecutorial jurisdiction . . ., full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice [or] the Attorney General . . .," with the exception of the power to apply for electronic surveillance under 18 U.S.C. § 2516. 28 U.S.C. § 594(a). The Department of Justice is required to "suspend all investigations and proceedings with respect to" a matter within the prosecutorial jurisdiction of an independent counsel, except to the extent that the independent counsel requests assistance. 28 U.S.C. § 597(a). An independent counsel may appoint, fix the compensation and assign the duties of employees necessary to the investigation, 28 U.S.C. § 594(c), may request assistance, including "resources and personnel" from the Department of Justice, 28 U.S.C. § 594(d), and may seek referral of "related matters" from either the Attorney General or the Division, 28 U.S.C. § 594(e), though the Division may not refer matters which the Attorney General has declined to refer, *In re Olson*, 818 F.2d at 47.

[10] In one instance, involving the Iran/Contra investigation, the Division granted an independent counsel, at the time of appointment, broader prosecutorial jurisdiction than the Attorney General had requested. J.S. App. 78a. That order, however, antedated the decision in *In re Olson*. Moreover, the Attorney General made no protest of the jurisdictional grant when it was made and in fact duplicated it when he provided the independent counsel with a parallel appointment pursuant to regulation. 28 C.F.R. Part 600; 52 Fed. Reg. 7270 (1987).

An independent counsel must "except where not possible, comply with the written or other established policies of the Department of Justice respecting the enforcement of the criminal laws," 28 U.S.C. § 594(f), and the statute permits him to dismiss matters within his jurisdiction without even conducting an investigation where that would be consistent with Justice Department policies, 28 U.S.C. § 594(g). An independent counsel must file at the conclusion of his investigation or prosecution a report on his activities with the Division, 28 U.S.C. §§ 595(b)(1), (2), which may release all or part of the report to Congress, the public or any appropriate person, 28 U.S.C. § 595(b)(3).

The Act lodges the power to remove an independent counsel exclusively with the Attorney General,[11] who may, however, act only "for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties." 28 U.S.C. § 596(a)(1). An independent counsel who has been removed by the Attorney General may bring a civil action for reinstatement. 28 U.S.C. § 596(a)(3).[12]

The office of an independent counsel terminates when he notifies the Attorney General that the mission of the

[11] Congress may remove an independent counsel through the impeachment process. 28 U.S.C. § 596(a)(1).

[12] One of the principal differences between the 1983 version of the Act, under which appellant was appointed, and the 1987 version involves this civil action. The 1983 legislation vested the Division with exclusive jurisdiction to hear such a case and authorized reinstatement or other appropriate relief upon a finding that the removal of the independent counsel "was based on error of law or fact." 28 U.S.C. § 596(a)(3). The 1987 reenactment transferred jurisdiction over such a suit to the district court for the District of Columbia and omitted reference to the "error of law or fact" standard. *See* Pub. L. No. 100-191, § 2, 101 Stat. 1293, 1305 (1987). This provision is immediately applicable to all existing independent counsel. *Id.*, § 6, 101 Stat. 1307-08. *See* pp. 22-23 & notes 33-34 *infra*.

office is complete and he files the required report with the Division on his investigation. 28 U.S.C. § 596(b)(1). The Division may, on its own motion or that of the Attorney General, terminate the office earlier upon a finding that the investigation of all matters within the independent counsel's jurisdiction and any resulting prosecutions "have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions." 28 U.S.C. § 596(b)(2).

The role of Congress under the Act is limited to the receipt of reports and the conduct of appropriate oversight. *See* 28 U.S.C. §§ 595(a), (d).[13]

3. Proceedings Under the Act in the Olson Investigation

Upon receipt of the Judiciary Committee report, the Attorney General directed the Public Integrity Section of the Criminal Division to conduct a preliminary investigation. In a lengthy and careful report, Public Integrity concluded that the appointment of an independent counsel was warranted to investigate the Committee's allegations regarding the conduct of appellees Olson, Schmults and Dinkins.[14] Because many high-level Criminal Divi-

[13] A majority of the members of either party of the Judiciary Committee of either House may formally request the Attorney General to appoint an independent counsel, and the Attorney General is required to provide written notification of any action he has taken in response to the request. 28 U.S.C. § 595(e). In addition, an independent counsel is required to advise the House of Representatives of "any substantial and credible information which such independent counsel receives that may constitute grounds for an impeachment." 28 U.S.C. § 595(c).

[14] Analysis & Recommendations Concerning the Report of the House Judiciary Committee, Public Integrity Section, April 4, 1986, at 151-52. The materials cited in this section were not made a part of the record in the district court. They are, however, all public portions of the record before the Division in *In re Olson*. A copy of these materials has been lodged with the Clerk of the Court.

sion officials recused themselves, the Public Integrity Report was reviewed by Deputy Assistant Attorney General John C. Keeney and then United States Attorney for the District of Massachusetts William F. Weld, who acted as the Attorney General's Special Assistant in the matter. Mr. Keeney recommended the appointment of an independent counsel to investigate Mr. Olson alone.[15] Mr. Weld recommended the appointment of an independent counsel to investigate the allegations against Messrs. Olson and Schmults, but not Ms. Dinkins.[16]

Overruling the views of virtually all the professional prosecutors on his staff, the Attorney General on April 10, 1986, applied to the Division for the appointment of an independent counsel solely with respect to the conduct of Mr. Olson.[17] The Attorney General concluded on the basis of the preliminary investigation that Mr. Schmults and Ms. Dinkins both lacked the requisite "criminal intent" to obstruct the Committee's investigation.[18] He requested that the independent counsel be given jurisdiction to investigate whether Mr. Olson gave false testimony to the Subcommittee "and any other matter related to that allegation." [19]

On April 23, 1986, the Division appointed James C. McKay as independent counsel to investigate

> whether testimony of Mr. Theodore Olson and his revision of such testimony on March 10, 1983, vio-

[15] *See* Memorandum, John C. Keeney to William F. Weld, April 4, 1986, at 8.

[16] *See* Memorandum, William F. Weld to Attorney General, April 4, 1986, at 1, 4, 8.

[17] *See* Report of the Attorney General Pursuant to 28 U.S.C. § 592(c)(1) Regarding Allegations Against Department of Justice Officials in the United States House Judiciary Committee Report, April 10, 1986, at 11.

[18] *See id.* at 22, 47.

[19] *See id.* at 2-3, 11.

> lated either 18 U.S.C. § 1505 or § 1001, or any other provision of federal law . . . [and] any other allegation or evidence of violation of any Federal criminal law by Theodore Olson developed during . . . and connected with or arising out of that investigation . . . .[20]

Mr. McKay later resigned, and the Division on May 29, 1986, appointed appellant to replace him, with the same jurisdiction.

Following the initial stages of the investigation, appellant applied to the Attorney General under § 594(e) for referral of the allegations regarding appellees Schmults and Dinkins as "related matters."[21] On December 17, 1986, the Attorney General declined the requested referral, on the ground that he had previously considered the issue and that his decision was final under § 592(b)(1).[22]

On January 13, 1987, appellant sought referral of the Schmults and Dinkins matters from the Division under § 594(e). The Attorney General opposed the referral, as did Mr. Schmults and Ms. Dinkins, appearing as *amici curiae*. On April 2, 1987, the Division ruled that the Attorney General's original determination that there were no reasonable grounds for further investigation of Mr. Schmults and Ms. Dinkins was final and unreviewable under § 592(b)(1), and hence that it had no power to make the requested referral under § 594(e). *In re Olson*. The Division went on, however, to interpret the original grant of jurisdiction to permit inquiry into whether Mr. Olson may have participated with others,

[20] Order of April 23, 1986, No. 86-1, D.C. Cir. Indep. Couns. Div., at 1-2.

[21] *See* Letter, Alexia Morrison to Edwin Meese III, November 14, 1986.

[22] *See* Letter, Arnold I. Burns to Alexia Morrison, December 17, 1986.

including Mr. Schmults and Ms. Dinkins, in an unlawful scheme to obstruct the Judiciary Committee's investigation. 818 F.2d at 47-48.

4. The Litigation of the Constitutional Issues

In May and June 1987 grand jury subpoenas *ad testificandum* and *duces tecum* were served on Mr. Schmults and Ms. Dinkins. J.A. 9, 11, 17, 19. A subpoena *duces tecum* for documents only was also served on Mr. Olson. J.A. 14. All three moved to quash the subpoenas on the ground that the Act was unconstitutional and hence that appellant was without authority to proceed.[23] They claimed that the Act violated the separation of powers principle, the Appointments Clause of the Constitution, art. II, § 2, cl. 2, and the strictures of Article III.

The district court on July 20, 1987, upheld the constitutionality of Title VI. J.S. App. 129a. Appellees declined to obey the order to comply with the subpoenas. Accordingly, on August 18 and 19, 1987, the district court held all three in contempt of court pursuant to 28 U.S.C. § 1826(a) and ordered them confined for the life of the grand jury or until they complied with the subpoenas. *Id.* at 140a-48a. The court stayed the effect of its orders of confinement pending expedited appellate review.

A divided panel of the court of appeals reversed, finding the statute unconstitutional in several respects. The majority, in an opinion by Circuit Judge Laurence H. Silberman, held (1) that an independent counsel is a "principal" officer of the United States and thus is re-

[23] Mr. Olson argued separately that the scope of the investigation exceeded the powers of the independent counsel under the appointing order and the statute. This argument was rejected by the district court, and the court of appeals did not reach it, apparently in light of its conclusion that the Act was unconstitutional. Judge Ruth Bader Ginsburg, dissenting in the court of appeals, found the contention unripe for judicial review. J.S. App. 127a-28a.

quired by the Appointments Clause to be nominated by the President and confirmed by the Senate; (2) that the Appointments Clause cannot be read to permit appointment by a court of law of "inferior" officers performing executive functions; (3) that the limitations on the Executive Branch's power to remove an independent counsel and the insulation of the independent counsel's activities from Executive Branch control invade the President's power to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3; (4) that this incursion is not justified by any concerns legitimately within the purview of the Congress; and (5) that the Act involves the Judicial Branch in the prosecutive function in derogation of the limitations of Article III and of the neutral role envisioned by the separation of powers principle, thus creating unacceptable risks for individual liberty. Circuit Judge Ruth Bader Ginsburg dissented.[24]

SUMMARY OF ARGUMENT

I.

Our threshold submission is that the constitutional questions decided below were not, and are not, ripe for adjudication. That is because, under *Blair v. United States*, 250 U.S. 273 (1919), a witness subpoenaed by a grand jury cannot challenge the constitutionality of the statute underlying the investigation, even after being held in contempt for failure to comply. He may assert a testimonial privilege or other objection personal to him in

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[24] The majority also rejected appellant's contention, based on *Blair v. United States*, 250 U.S. 273, 283 (1919), that a recipient of a grand jury subpoena cannot challenge the constitutionality of a statute on a motion to quash the subpoena. The majority relied on the court of appeals' earlier decision in *In re Sealed Case*, 827 F.2d 776 (D.C. Cir. 1987). Alternatively, it held that appellant had waived the ripeness/standing point by failing to raise it in the district court. J.S. App. 9a n.6. Judge Ginsburg did not address these issues.

defense to a subpoena and raise those matters by appeal if his motion is denied and he is adjudicated in contempt. But no court should entertain a general claim going to the jurisdiction of the court or grand jury at least until an indictment is returned. The rule of *Blair*—important as it is to effective law enforcement—remains good law. And the objection to premature consideration of the constitutional issue may be considered at any time.

II.

We next address the challenges to Title VI advanced under the Appointments Clause and Article III. The first question is whether an independent counsel is an "inferior" officer whose appointment, under the Clause, Congress may provide for by alternative means. It is not entirely clear where the constitutional line is drawn between "principal" and "inferior" officers, but there can be no doubt that a temporary special prosecutor with a very limited mandate belongs to the latter category, even if she is not "subordinate" to any other official.

Nothing in the Appointments Clause forbids cross-branch appointments as a general principle. On the contrary, some such appointments are mandated or unquestionably authorized, and there is no justification for imposing an arbitrary barrier in respect of "inferior" Executive Branch officers. Nor does the limiting principle of "congruity" generally exclude the appointment of prosecutorial officers by a court of law, and certainly not in the special situation to which Title VI was addressed.

In large part, the objections to Title VI under Article III are answered by reference to the Appointments Clause: the appointment function expressly authorized for courts in the latter provision must be read as supplementing Article III. And the power of appointment should be deemed to embrace incidental authority to define the mandate of the independent counsel.

III.

Title VI involves no aggrandizement of congressional or judicial power at the expense of the Executive Branch. Accordingly, the proper inquiry, under this Court's separation of powers jurisprudence, is whether the legislative scheme significantly interferes with the executive's performance of its assigned functions, and, if so, whether that impact is justified by an overriding need to promote legitimate congressional objectives.

Although law enforcement is an executive function, there is no absolute prohibition on legislative restrictions that circumscribe presidential discretion or insulate decision-making from the normal chain of command. Criminal prosecution is no exception, as our history attests. Nor is it impermissible to restrict the executive's removal power, at least in respect of "inferior" officers.

To whatever extent Title VI trenches on the prerogatives of the Executive Branch, the justification is ample. The present very limited solution to an uncommon but acute problem goes no further than absolutely necessary to accomplish a wholly proper objective.

Contrary to the fears expressed by the majority below, Title VI presents no threat to individual liberty. Neither the scheme, nor actual experience under it, justifies the charge. If anything, the appointment of an independent counsel in cases of actual or presumptive conflict within the Executive Branch assures the target of an investigation a more detached decision-maker who is not under pressure to prove his integrity by prosecutorial zeal. And the ruling of the independent counsel that prosecution is not warranted is far more significant vindication than a like decision by a political ally within the Administration.

ARGUMENT

Introduction

The majority below reached its result by effectively ignoring the three cardinal rules that must inform judicial consideration of legislation challenged as unconstitutional. The first axiom, of course, is that an Act of Congress is presumed to be constitutional. In every case, a court should be most reluctant to conclude that a coequal branch has broken its oath to obey the Constitution. But deference to the judgment of the Congress is especially called for when what is involved is a peculiarly political problem in the functioning of government, and the legislation drafted to meet it is not a hasty response, but is the product of long and careful consideration. Here, moreover, there is no countervailing basis for suspecting that constitutional boundaries may have been overstepped in consequence of inter-branch feuding: the Congress was exceedingly restrained in its treatment of executive prerogatives and, in any event, wholly eschewed any aggrandizement of its own powers.

Against the backdrop of official corruption in eighteenth century England, it is most unlikely that those who wrote our Constitution knowingly foreclosed a measure that would tend—however modestly—to combat the evil of unpunished malfeasance in high office. Just as the Constitution is "not a suicide pact" in external affairs, *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963), so it ought not be presumed to disable the government of the nation from guarding against such internal dangers, *see Buckley v. Valeo*, 424 U.S. 1, 121 (1976). Respect for the insight of the Framers—no less than deference to the Congress of today—counsels judicial restraint in this setting.

The court of appeals majority also ignored the second axiom, that, where fairly possible, statutes should be construed so as to save them from unconstitutionality. *E.g., NLRB v. Catholic Bishop*, 440 U.S. 490, 500-01

(1979). Again and again, as we detail below, the court of appeals gave provisions of the statute unnecessarily wide scope and thereby created constitutional problems that would not exist under a more sympathetic construction.

Finally, the court below did not exhaust the ways of avoiding constitutional adjudication, as was its duty. *E.g., Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 474 (1982). The suggestion that all or some of the constitutional issues were not ripe for consideration, *see* pp. note 33 & pp. 24-29, *infra*, was quickly brushed aside. *See* J.S. App. 9a n.6, 43a n.36. Nor was the court reluctant to reach every conceivable constitutional challenge. Where one ruling was sufficient, the majority below went on to condemn the statute on no less than five independent constitutional grounds.

In these circumstances, our first task is to attempt to restore the true balance by stressing that Title VI of the Ethics in Government Act is not the broad incursion on executive prerogative painted by the majority below, but rather a very measured response to an uncommon, yet significant and recurring, law enforcement problem, which works an exceedingly narrow displacement of traditional executive authority.

Congress enacted Title VI against a backdrop of Executive Branch scandals from Teapot Dome to Watergate, in several of which the Department of Justice was effectively immobilized by a real or apparent conflict of interest.[25] The Senate Committee concluded in 1982:

[25] *See In re Olson*, 818 F.2d at 39-43. Of the eight presidential administrations since World War II, five—those of Presidents Truman, Eisenhower, Nixon, Carter and Reagan—have encountered serious allegations of criminal wrongdoing at the upper echelons of the Executive Branch.

The court below disputed Congress' conclusion that "this ostensible problem is truly a conflict of interest." J.S. App. 61a. *See also id.* at 64a. This, we submit, amounts to prohibited judicial second-guessing of legislative fact-finding. *See e.g., Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 330-31 n.12 (1985).

> When conflicts exist, or when the public believes there are conflicts, public confidence in the prosecutorial decisions is eroded if not totally lost. Thus, a statutory mechanism providing for a temporary special prosecutor is necessary to insulate the Attorney General from making decisions in these instances.[26]

One concern was, of course, that the Attorney General's close relationship, personal and political, with the President and his senior officers might disincline him to prosecute high government officials when he should. But Congress also sought to assure fairness to individuals under scrutiny by insulating prosecutorial decision-making from the political pressures which might be felt by an Attorney General bent on establishing an administration's claim to probity:

> [T]here is also a danger that, in other cases, the Attorney General may bend over backwards to avoid the risk of loss of public confidence in his office, and make a harsh and unfair prosecutorial decision against a public official.[27]

In enacting Title VI, Congress regularized the hitherto haphazard process by which several administrations had divested themselves of the political burden of prosecutorial decision-making in cases involving those close to the President.[28] To be sure, some safeguards against the mal-

[26] S. Rep. No. 496, 97th Cong., 2d Sess. 4 (1982).

[27] *Id.* at 5. The court below, in concluding that the statute endangered the liberties of potential investigative targets, ignored both this ameliorating function of an independent counsel and the parallel name-clearing purpose which the device serves.

[28] In the Teapot Dome scandal Congress authorized the appointment of a special prosecutor "with full power and authority to carry on [criminal] proceedings," H.J. Res. 160, 68th Cong., 1st

function of earlier experiments were added. But that was done with the minimum possible diminution of Executive Branch authority.

First, the Act applies of its own force to no more than a handful of top-level government officials and political confidants of the President.[29] Moreover, the Attorney General has complete control over the invocation of the statutory process. No independent counsel may be appointed except upon his application, and he possesses unreviewable discretion both to refuse to initiate a preliminary investigation, *Dellums v. Smith*, 797 F.2d 817, 818 (9th Cir. 1986); *Nathan v. Smith*, 737 F.2d 1069 (D.C. Cir. 1984), and to decide whether the results of such an investigation warrant the appointment of an independent counsel, *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984). So also, although § 593(b) directs the Division to define the jurisdiction of an independent counsel, § 592

Sess., 43 Stat. 16 (1924), and President Coolidge appointed such a prosecutor, *see In re Olson*, 818 F.2d at 40. President Nixon initially approved the appointment of Watergate Special Prosecutor Archibald Cox, after whose firing Attorney General Saxbe appointed Leon Jaworski, with full assurance of immunity from presidential interference, embodied in a formal regulation. *See United States v. Nixon*, 418 U.S. 683, 694-95 (1974). Attorney General Bell appointed an official outside the Department of Justice to investigate allegations concerning President Carter and his brother Billy. *See* S. Rep. No. 496, 97th Cong., 2d Sess. 5 (1982).

The present Administration, while recently joining the attack upon the constitutionality of the statute, has invoked the Act on seven known occasions and has recognized the importance of the independent counsel device to public confidence in law enforcement both by making parallel appointments pursuant to regulation of independent counsels previously appointed under the Act, *see* 28 C.F.R. 600; 52 Fed. Reg. 7270 (1987), and by signing rather than vetoing the 1987 renewal of the legislation, despite the President's expressed constitutional doubts, *see* 23 Weekly Comp. Pres. Doc. 1526 (Dec. 15, 1987).

[29] The Attorney General has discretion to invoke the Act's process with respect to other persons. *See note 7 supra.*

(b)(1) has been held to give the Attorney General virtually complete control over the content of that jurisdiction— a prerogative fully exercised in this case by eliminating two potential targets from the investigation. *In re Olson*, 818 F.2d at 47.[30]

Furthermore, while the Attorney General has no direct control over the conduct of an investigation, he alone is granted the power to remove an independent counsel. And the President still enjoys his unfettered constitutional authority to pardon the subject of any federal criminal investigation at any stage of the process. U.S. Const., art. II, § 2, cl. 1; *see Schick v. Reed*, 419 U.S. 256, 260-66 (1974); *Ex parte Garland*, 71 U.S. 333 (1867).

The Executive Branch thus retains, within the narrow compass of the Act, complete power over the initiation of the statutory process; virtually total control over the shape of the independent counsel's investigation; exclusive, albeit limited, authority to remove an independent counsel; and absolute constitutional power to put a stop to an investigation at any moment through the pardon power. The Act takes away only (1) the power to name the prosecutor; (2) supervision of the day-to-day conduct of an investigation which the Attorney General has deemed warranted; and (3) the power to insist that an indictment be sought.

With all respect, we must conclude that the majority below read the statute with a hostile eye in describing

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[30] Judge Ginsburg observed in dissent below that

> the Act must be read to require the court's jurisdictional specification to be substantially as requested by the Attorney General. The essential decision whether to proceed in a given direction toward potential prosecution, then, rests with the Attorney General, not the Special Division.

J.S. App. 97a. The Division's definition of appellant's jurisdiction in this investigation tracked the Attorney General's proposal virtually *verbatim*.

further intrusions into the executive domain. For example, the prevailing opinion states:

> The independent counsel is free to ignore Department of Justice policy if it is "not possible" to follow it, and that judgment is for her alone to make. 28 U.S.C. § 594(f). The consequence of this scheme . . . is that targets of an independent counsel may be subjected to investigations and prosecutions governed by rules different from those that apply to the investigation of any other citizen . . . .

J.S. App. 57a. This is a curious reading of a provision which mandates that an independent counsel "*shall*, except where not possible, comply with" Justice Department prosecution policies.[31] (Emphasis added.) It is doubly curious in the absence of any suggestion by the majority that appellant has "ignored" any such policies in the conduct of this investigation.

Similarly, the majority below perceived a threat to the interests of investigative targets in what it viewed as the isolation of the independent counsel from the resources of the Department of Justice:

> Wise exercise of prosecutorial discretion is dependent in part upon access to officials who are participants in the ongoing process of enforcing the law and who are able to take a longer view of an individual case. Yet the independent counsel is cut off from the accumulated lore and wisdom of career Department of Justice officers, who are in a unique position to evaluate "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan."

[31] Later in the opinion the majority carried this inversion of the statutory scheme even further, stating that "[a]n independent counsel is not required to follow Department of Justice policies . . . ." J.S. App. 72a.

J.S. App. 72a, *quoting Wayte v. United States*, 470 U.S. 598, 607 (1985). Once again, however, the majority created a problem by ignoring the provisions of the statute. An independent counsel is not "cut off from the accumulated lore and wisdom of career Department of Justice officials." Section 594(d) provides that

> [an] independent counsel may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include . . . the use of the resources and personnel necessary to perform such independent counsel's duties.[32]

The majority below also exaggerated the statutory role of the Special Division, creating an unjustified spectre of judicial entanglement in the prosecutorial process. It stated:

> This Special Court . . . holds over the head of the independent counsel both the broadsword and the rapier to control the pace and depth of the independent counsel's activities.

J.S. App. 82a. This conclusion was based on three provisions of the Act: § 593(b), which was read to give the Division unfettered power to define the jurisdiction of an independent counsel without regard to the views of the Attorney General, J.S. App. 78a-80a; § 596(a)(3), which was viewed as reducing the Attorney General's removal authority to a mere power to petition "the Special Court for a termination order which the Special Court could grant or not following its own independent investigation of the facts and the law," *id.* at 56a; and § 596(b)(2), which was interpreted to mean that the Division "may in effect abolish the office of the independent counsel

[32] The lower court's concern with access to the experience of professional prosecutors is ironic here in light of the fact that it was the Attorney General who chose deliberately to override the recommendations of "career Department of Justice officials" on the question whether further investigation of appellees Schmults and Dinkins was warranted.

whenever two of the judges believe her investigation no longer serves a useful purpose," *id.* at 82a.

In each instance, the majority below at a minimum ignored an available construction of the statute which would have avoided the constitutional question it perceived. We have already shown that § 593(b), when construed together with § 592(b)(1), need not be read—and is not read by the Division—to permit it to grant an independent counsel authority to investigate matters which the Attorney General has considered and rejected. *See* pp. 18-19 & n.30 *supra*.

With respect to § 596(a)(3), it should first be said that neither the Division nor the Department has had occasion to construe the provision.[33] Moreover, although the majority below insisted on disregarding it, J.S. App. 53a n.41, the fact is that Congress has amended § 596(a)(3), with immediate effect, in two significant ways: (1) it removed jurisdiction of an action by an independent counsel challenging a removal decision of the Attorney General from the Division and placed it in the district court; and (2) it deleted the "error of fact or law" language relied upon by the court below, rendering it clear that the judicial standard of review is whether the Attorney General had "good cause" to remove the independent counsel. *See* note 12 *supra*. Thus, "here-and-now subservience" of the independent counsel to the Division which the majority perceived—if it ever existed—has

[33] No Attorney General has ever removed any independent counsel. The provision is thus arguably "unripe" for consideration in the present context. The majority rejected this approach, relying on *Bowsher v. Synar*, 106 S. Ct. 3181, 3189 n.5 (1986). J.S. App. 43a-44a n.36. In *Bowsher*, however, the existence of the removal power was deemed to create a subservience on the part of the Comptroller General to Congress. The question with respect to Title VI, by contrast, is whether limitations on the Attorney General's removal power impermissibly limit his control over an independent counsel, a question which would seem to require some factual context for resolution.

been erased, and that erasure applies to this independent counsel.[34]

Finally, the majority below likewise both ignored the fact that the Division has never invoked § 596(b)(2) to terminate the office of any independent counsel and read into this provision far broader power than its language

[34] Even assuming that it properly ignored the 1987 amendments, the majority still construed the earlier version of § 596(a)(3) unnecessarily to expand the Division's authority. There is no reason to read the "error of fact or law" language in § 596(a)(3) to abrogate the Attorney General's power under § 596(a)(1) to remove an independent counsel for "good cause," and to make the Division into a "superior and revising agency," J.S. App. 55a, with the authority to ignore the Attorney General's determination at its whim. Compare art. III, § 2, cl. 2 of the Constitution, which gives this Court "appellate jurisdiction, both as to Law and Fact," in the vast bulk of the cases coming before it.

The majority's reading also contradicts clear congressional statements in 1983 and 1987 about the intent of the 1983 version. Congress in 1983 amended § 596(a)(1) to change the removal standard from "extraordinary improprieties" to "good cause." The Senate Committee explained:

> Testimony . . . showed that the present standard of "extraordinary impropriety" is undefinable. Amending the standard to allow the Attorney General to remove the special prosecutor "for good cause"—a standard which is used for removal of the heads of independent agencies—would allow the Attorney General, ***and the court which has judicial review of such removals under 28 U.S.C. section 596***, to have a developed body of law to govern the standard of removal.

S. Rep. No. 496, 97th Cong., 2d Sess. 17 (1982) (emphasis added). Similarly, the 1987 Conference Report, discussing the elimination of the "error of fact or law" language from § 596(a)(3), explained that no substantive change was intended:

> the conferees want to avoid any possibility that [the omitted language] would be viewed as having established a different standard [from "good cause"]. ***The intent of the statute as originally enacted, and as reauthorized***, is that the courts should apply the standards established by existing case law on removal of such officials.

H.R. Conf. Rep. No. 452, 100th Cong., 1st Sess. 37 (1987) (emphasis added).

actually imports. The provision empowers the Division to terminate the office of an independent counsel only upon a finding that the mission of the office has been entirely or substantially completed. This is a far cry from permitting the Division to "abolish the office of the independent counsel whenever two of the judges believe her investigation no longer serves a useful purpose." J.S. App. 82a.

I. APPELLEES WERE NOT ENTITLED TO CHALLENGE THE CONSTITUTIONALITY OF TITLE VI IN RESPONSE TO THE GRAND JURY SUBPOENAS.

We submit that the present case is controlled by *Blair v. United States*, 250 U.S. 273, 283 (1919), in which this Court squarely held that a witness subpoenaed by a grand jury and adjudged in contempt for refusing to obey is

> not entitled to raise any question about the constitutionality of the statutes under which the grand jury's investigation was conducted.

The ruling in *Blair* was predicated on two separate but congruent concerns. The first relates, under the rubric of ripeness or standing, to the propriety of the exercise of judicial power:

> Considerations of propriety, as well as long-established practice, demand that we refrain from passing on the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.

250 U.S. at 279. The Court considered "the relation of a witness to the proceeding in which he is called," and concluded that "he is not interested to challenge the jurisdiction of court or grand jury over the subject-matter that is under scrutiny." *Id.*

The Court was equally concerned with the effective functioning of the grand jury. After developing the history of the institution, it noted:

> It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.

Id. at 282. Accordingly, it was held that "witnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particular subject-matter that is under investigation." *Id.*

The Court recognized that certain objections to a subpoena, by their very nature, are lost if they are not entertained prior to compliance. It pointed in this regard to a witness' Fifth Amendment privilege, and added that "perhaps in other cases for special reasons a witness may be excused from telling all that he knows." *Id.* at 281. But absent such special circumstances

> the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry.

Id. at 282.

There is not a hint in any opinion of this Court that the authority of *Blair v. United States* has been weakened by the passage of time or by any intervening event. To the contrary, the Court has adhered scrupulously to both aspects of the *Blair* holding. The ripeness and standing requirements have regularly been applied to constitutional challenges to state and federal action. *E.g., Pennell v. City of San Jose*, 108 S. Ct. 849 (1988); *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 474 (1982) (*quoting Blair*); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981). And the Court likewise has consistently declined to entertain constitutional claims that could interfere with the functioning of the grand jury, and that are not based on es-

tablished testimonial privileges or other claims to withhold evidence that would be lost by compliance, citing *Blair* in the process. *See, e.g., United States v. Calandra*, 414 U.S. 338, 345-46 (1974); *United States v. Dionisio*, 410 U.S. 1, 10 (1973); *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972); *Costello v. United States*, 350 U.S. 359, 362-63 & n.6 (1956).

Nonetheless, the court of appeals in *In re Sealed Case*, 827 F.2d 776, 779 (D.C. Cir. 1987)—the precedent followed below, J.S. App. 9a n.6—perceived a "tension" between *Blair* and *United States v. Ryan*, 402 U.S. 530 (1971), and held that *Ryan* permitted the entertainment of a constitutional challenge to Title VI by the recipient of a grand jury subpoena.[35] But, in fact, there is no suggestion in *Ryan* that any inroad was intended on *Blair*, which is not even cited. This was doubtless because the two cases speak to entirely different issues. *Ryan* involved, not an issue of ripeness or standing, but of finality for purposes of appeal. The recipient of a grand jury subpoena *duces tecum* moved to quash the subpoena on the ground that to comply would be unduly burdensome. The district court denied the motion to quash, and the witness, without refusing to obey and being held in contempt, appealed. This Court reaffirmed the holding of *Cobbledick v. United States*, 309 U.S. 323 (1940), that

> one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey.

402 U.S. at 532.

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[35] The constitutional issue was not ultimately reached in that case, the court upholding the powers of the independent counsel there on the basis of his parallel appointment by the Attorney General. *In re Sealed Case*, 829 F.2d 50 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 108 S. Ct. 753 (1988).

Here, we do not question that appellees may appeal the contempt order entered against them. But that conclusion does not speak to whether the constitutional challenge was ripe for decision by the district court. *Ryan* did not purport to broaden the class of issues that may be raised on a motion to quash, and the Court there certainly did not suggest it was authorizing a challenge to the constitutionality of the statute under which the grand jury issued the subpoena. A passage in *Ryan*, it is true, speaks of an attack on a subpoena as unduly burdensome or "otherwise unlawful." *Id.* This perhaps unguarded dictum must be read in context. The complaint in *Ryan* that the subpoena *duces tecum* was too broad, imposing an undue burden on the witness, was akin to a testimonial privilege which, if not adjudicated on the motion to quash, would be lost forever. In the circumstances it would be extraordinary if the Court intended to overrule *sub silentio* so venerable and important a precedent as *Blair*.

Plainly, a challenge to the constitutionality of Title VI, unlike such personal claims as an assertion of testimonial privilege or a claim of burdensome overbreadth, is not forever lost through compliance with a subpoena. It is a point that can be raised and decided in the context of any criminal case that eventuates by any defendant.[36] In the meanwhile, the witness will have been put to the inconvenience of giving evidence. But, as this Court said in *Blair*, "the personal sacrifice involved is a part of the necessary contribution of the individual to the welfare of the public." 250 U.S. at 281.

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[36] This is precisely the ground on which the courts have rebuffed several prior attempts to obtain pre-conviction review of the constitutionality of Title VI by injunctive action, *see Deaver v. Seymour*, 656 F. Supp. 900, 902 (D.D.C.), *aff'd*, 822 F.2d 66 (D.C. Cir.), *stay denied*, 107 S. Ct. 3177, *cert. denied*, 108 S. Ct. 99 (1987); *North v. Walsh*, 656 F. Supp. 414, 421 (D.C. 1987), and by immediate appeal of the denial of a pretrial motion to dismiss an indictment, *see United States v. Deaver*, No. 87-3028, D.C. Cir., June 15, 1987, *cert. denied*, 108 S.Ct. 99 (1987). The only difference

Ryan aside, we recognize that there may well be extreme cases in which a subpoena is open to challenge on the ground that it is in no sense a legitimate command, either because the issuing agency is not even a *de facto* grand jury or because the applicant for the subpoena is without color of authority to provoke its issuance. That is not the present situation. Here the regularly convened grand jury is not itself vulnerable to attack. And whatever the ultimate decision with respect to the constitutionality of Title VI, the independent counsel is acting pursuant to authority expressly conferred by a law which was duly enacted by the Congress and the President and which must be presumed constitutional. This, we suggest, is indistinguishable from *Blair*, where the challenge was to the constitutionality of the statute, possible violations of which the grand jury was investigating.

We are also unable to accept the conclusion of the majority below that "this is [not] a jurisdictional issue," J.S. App. 9a n.6, and that appellant waived the ripeness/standing point by not raising it in the district court.[37]

This Court has repeatedly held that issues of ripeness and standing implicate Article III's requirement of a "Case or Controversy," *e.g.*, *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986); *Flast v. Cohen*, 392 U.S. 83, 94-101 (1968); *United Public Workers v.*

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between this litigation and an injunction action is that grand jury subpoenas have been issued, but compliance with such a subpoena, absent a privilege claim or its functional equivalent, is not the sort of burden that will sustain litigation of constitutional issues.

[37] Only days before appellees moved to quash their subpoenas, the court of appeals ruled in *In re Sealed Case* that Lt. Col. Oliver North could challenge the constitutionality of Title VI in a procedurally identical posture. The opinion was sealed, though the order reversing the district court on the ripeness issue was public. By the time the appeals in this litigation were briefed, the court of appeals had unsealed its opinion in *In re Sealed Case*. Upon review of that opinion, appellant raised the issue in the court of appeals.

Mitchell, 330 U.S. 75, 89-91 (1947), or prudential concerns for the avoidance of unnecessary constitutional decisions, *e.g.*, *Warth v. Seldin*, 422 U.S. 490, 498-501 (1975); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). For this reason, such questions may not be "waived" or stipulated away by the parties, but may be considered at any stage of the litigation and on the Court's own motion. *Bender*, 475 U.S. at 541-42; *Regional Rail Cases*, 419 U.S. at 138; *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). *See also, e.g., American Federation of Gov't Employees v. O'Connor*, 747 F.2d 748, 752 (D.C. Cir. 1984); *Duke City Lumber Co. v. Butz*, 539 F.2d 220, 221 n.2 (D.C. Cir. 1976).[38]

II. THE APPOINTMENTS CLAUSE AUTHORIZES CONGRESS TO VEST IN A "COURT OF LAW" THE POWER TO APPOINT INDEPENDENT COUNSELS AND TO DEFINE THEIR TEMPORARY PROSECUTORIAL JURISDICTION.

The majority below held that Title VI violates the Appointments Clause of the Constitution, art. II, § 2, cl. 2, for two independent reasons: (1) because in its view an independent counsel is a "principal officer" requiring presidential nomination and Senate confirmation, Congress could not constitutionally entrust her appointment to a court, J.S. App. 10a-23a; and (2) because, even if an independent counsel is an "inferior Officer," the Clause does not authorize Congress to provide for "inter-branch" appointments generally and judicial appointments of prosecuting officers in particular, *id.* at 29a-42a. Neither conclusion is correct.

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[38] *District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1084-85 (D.C. Cir. 1984), cited below, provides no support to the majority's waiver holding. There the court refused to entertain for the first time on appeal, not an issue of justiciability, but an entirely new substantive theory of recovery.

A. Congress Properly Denominated Independent Counsels "Inferior Officers."

The Appointments Clause provides:

> [the President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

On its face, this text broadly divides "Officers of the United States"[29] into two categories: (1) "Ambassadors, other public Ministers and Consuls, [and] Judges of the supreme Court," whose appointment must be made by the President by and with the advice and consent of the Senate; and (2) "all other Officers of the United States, whose Appointments are not herein otherwise provided for," at least some of whom are "inferior Officers" whose appointments may be vested by Congress in "the President alone, in the Courts of Law, or in the Heads of Departments." An independent counsel plainly does not fall into the first category; the question is whether she is among those in the second category with respect to whom Congress may designate an alternative method of appointment. In sum, can she properly be denominated an "inferior Officer"?

One possible way of construing the proviso of the Appointments Clause is to read the words "such inferior

[29] Not all persons employed by the federal government are "officers" subject to the strictures of the Appointments Clause; some subordinates are "employees" whose appointments may be made by relatively low level "officers." *Auffmordt v. Hedden*, 137 U.S. 310 (1890); *United States v. Germaine*, 99 U.S. 508 (1879); *see Buckley v. Valeo*, 424 U.S. 1, 126 (1976). It is not disputed that the independent counsel is an "Officer of the United States" as defined in *Buckley*.

Officers" as embracing *all* appointed officials in the second category—all officers other than those mentioned at the outset (Ambassadors etc. and Justices of this Court). Although far from unambiguous, the only decision of this Court remotely on point, *United States v. Germaine*, 99 U.S. 508, 509-10 (1879) (dictum) (emphasis added), seems to support this construction:

> The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when offices became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided, in regard to *officers inferior to those specially mentioned*, Congress might by law vest their appointment in the President alone, the courts of law, or in the heads of departments.

While it is possible to understand the Court's reference to officers "specially mentioned" as embracing those identified in the proviso as well as in the first sentence of the Appointments Clause, that is not the most natural reading. And as we note below, "inferior" here—as in the Constitution—presumably means "*lesser* than," not "*subordinate* to."

The evolution of the Appointments Clause at the Convention suggests the same result. Until two weeks before the end of their deliberations, the delegates had tentatively accepted a division of the appointment power under which the Senate alone appointed Ambassadors and Justices of this Court and the President alone appointed all other officers. *See, e.g.*, 2 M. Farrand, *The Records of the Federal Convention of 1787* 183, 185 (rev. ed. 1911). There was, however, unease at the unconfined discretion left in the hands of the President, and it was suggested that Congress be empowered to provide otherwise—including delegation to state authority—in respect of the appointment of officers other than Ambassadors and Justices. *Id.* at 398-99, 405-06, 407. Accordingly, the issue was referred to a committee comprising a member from

each state. *See id.* at 406 n.12, 419 n.15, 473, 481. The Committee of Eleven sought to compromise by giving all appointments to the President, all, however, subject to Senate confirmation. *Id.* at 495, 498-99. But as soon as the new clause was taken up, various objections were interposed. *Id.* at 538-39. Although it was initially adopted unchanged, *id.* at 539, the existing proviso was added a week later, *id.* at 627-28. This scenario may well indicate a determination to restore something like the original scheme, retaining mandatory participation by the Senate only for diplomatic agents and Supreme Court Justices, while at the same time allaying fears of presidential abuse by introducing the possibility of new appointive agencies, at the option of Congress, for all other cases.[49]

It is not necessarily an objection that this reading of the Appointments Clause characterizes department heads and federal judges other than Justices of this Court as "inferior" officers. After all, the Constitution itself speaks of all lower federal tribunals as "inferior Courts." Art. I, § 8, cl. 9; art. III, § 1. And the head of an Executive Department is, of course, a subordinate of the President. We may add that there is no reason to doubt the Framers' willingness to concede such relatively wide discretion to the Congress on the score of appointments. The power was circumscribed and pointedly foreclosed any self-dealing, the Congress itself being excluded from

[49] There are indications that some Representatives in the First Congress believed heads of department were not, constitutionally, "inferior Officers," albeit those were mere passing remarks in the context of debate focusing on the *removal* power of the President. *See* 1 *Annals of Congress* 371-72 (1834). Congressman Richard Bland Lee of Virginia expressed the opposite view. *Id.* at 372. James Madison's statement, *id.* at 371-72, is ambiguous and it is not clear that the question was ever resolved, since deleting any reference to the appointing authority for department heads would, under the Appointments Clause, result in presidential appointment subject to Senate confirmation, whether the officer is "principal" or "inferior."

any appointing role. *See Buckley v. Valeo*, 424 U.S. 1, 125-30 (1976). Indeed, the proviso added to the Appointments Clause only permits Congress to *abdicate* the otherwise applicable confirmation prerogative of the Senate in favor of the Executive or Judicial Branch. And, of course, Congress remains entirely free to forego the option granted by the proviso and to retain the traditional appointment formula for any "inferior" officer.

Notwithstanding what has just been said, we do not rest on this broad view of congressional authority. Nor need the Court resolve the question. For present purposes, it is quite sufficient to decide that an independent counsel falls within a narrower category of lesser officers whose appointment Congress is free to vest in one of the specified alternative agencies. Perhaps "inferior Officers" comprise all those not mentioned anywhere in the Constitution. We are content to define the category as including those federal appointees who rank below judges and department heads. And, in assessing the relative importance of any office claimed to be "inferior"—necessarily one created by law—it is of course appropriate to examine the duties and powers and tenure assigned to it by Congress. Nor is it irrelevant to notice what compensation level has been fixed. It is, after all, Congress that determines the status of the officer when it defines the office.

No elaborate argument is needed to show that, under the suggested test, an independent counsel ranks as a mere "inferior" officer. The salary is fixed at Executive Level IV, three grades below the Attorney General. 28 U.S.C. § 594(b). And his duties and powers are severely restricted in scope—by the specific referral made—and in time. *See* 28 U.S.C. § 594. As both the district court and the Division concluded, on a functional view of the office, an independent counsel "is clearly an 'inferior officer'—he is appointed for a single task to serve for a temporary limited period." *In re Olson*, 818 F.2d at 44;

J.S. App. 131a-32a.[41] Precedent also supports classification of an independent counsel as an "inferior Officer." Temporary judicial appointments of United States Attorneys, who exercise the full panoply of prosecutorial powers on a much broader scale, have been upheld on the ground that they are "inferior Officers." *United States v. Solomon*, 216 F. Supp. 835, 840-43 (S.D.N.Y. 1963); *cf. Rice v. Ames*, 180 U.S. 371, 378 (1901) (U.S. Commissioners empowered to conduct extradition proceedings are "inferior Officers" properly appointed by a court).[42] Moreover, the D.C. Circuit has approved the appointment by the Attorney General of independent counsels exercising power "identical to that provided to an independent counsel by the Ethics Act." *In re Sealed Case*, 829 F.2d 50, 52 (D.C. Cir. 1987), *cert. denied sub nom. North v. Walsh*, 108 S. Ct. 753 (1988).[43] Since the Attorney General may, as a "head of department," appoint only "inferior Officers," it must follow, on a functional analysis, that statutory independent counsels are likewise "inferior Officers." [44]

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[41] *Cf. United States v. Germaine*, 99 U.S. 508, 511-12 (1879) (distinction between "officers" and "employees' turns upon "the ideas of tenure, duration, emolument, and duties, and that the latter were continuing and permanent, not occasional and temporary").

[42] *See also Hobson v. Hansen*, 265 F. Supp. 902, 911-16 (D.D.C. 1967) (3-judge court) (alternative holding) (upholding judicial appointment of members of District of Columbia School Board on ground they were "inferior Officers").

[43] *See* note 35 *supra*.

[44] The majority below sought to avoid this inevitable conclusion on two grounds: (1) apellant, having refused a proffered "parallel appointment" from the Attorney General, "cannot now base an argument for constitutional inferiority on the Attorney General's appointment power that she has explicitly rejected," J.S. App. 19a; and (2) where the Attorney General has appointed an independent counsel pursuant to regulation, he remains free to rescind the regulation and terminate the appointment, *id.* at 18a. The first argument is a *non sequitur*. The second is fatally flawed. Under the majority's purported functional analysis, it is the powers and duties of the office which must determine its "principal" or "inferior"

The objection interposed by the court below—that the independent counsel cannot be an "inferior Officer" because she is not "subordinate to a principal officer," J.S. App. 17a—is wholly without foundation.

It is reasonably clear that the term "inferior" is not used in the Appointments Clause in a hierarchical sense. To make "subordinacy" the touchstone of "inferior" status would, for example, collide with the majority's insistence that department heads are "principal" officers: each of them is plainly "subordinate" to the President and serves at his pleasure. On the other hand, the lower court judges whom the majority below insisted are not "inferior Officers," J.S. App. 11a, are members of what the Constitution expressly labels "inferior Courts." The fact is that the word "inferior" does not now, and did not when the Constitution was written, necessarily mean "subordinate to a superior"; it is perhaps more frequently used to mean "lower in place or importance." [45]

This is apparently the view adopted by the Court in *Ex parte Siebold*, 100 U.S. 371 (1880), where it upheld judicial appointment of federal election supervisors as "inferior Officers," *id.* at 397-98, even though they were not "subordinate" to any superiors who could direct their activities or remove them from office, *id.* at 379-80.[46]

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status, and it is inconceivable that the identical office is an "inferior" one when its occupant is appointed by a "Head of Department" and a "principal" one when its occupant is appointed by a "Court of Law."

[45] Webster's *Third New International Dictionary* 1158 (unabridged ed. 1981). For usage at the time of the Convention, *see* 1 S. Johnson, *A Dictionary of the English Language* (1785), which gives subordinate as only the fourth and last meaning for "inferior."

[46] *Cf. United States v. Eaton*, 169 U.S. 331, 343 (1898) (Vice Consul remains "inferior Officer" even when serving as Acting Consul; temporary performance of duties does not "transform [him] into the superior and permanent official"). This has long been the understanding under which Congress has acted. Thus, for instance, the President alone is by law authorized to appoint the

In any event, if appellant is deemed to require a "superior," she has one, at least in the constitutionally significant sense—the Attorney General. His exclusive, though limited, power to remove an independent counsel, 28 U.S.C. § 596(a)(1), is at least as strong as Congress' power over the Comptroller General, which was held by this Court to create "here-and-now subservience" in *Bowsher v. Synar*, 106 S.Ct. 3181, 3188-89 & n.5 (1986). The grounds for removal of an independent counsel are indistinguishable in substance from those for removal of a Comptroller General, *compare* 28 U.S.C. § 596(a)(1) *with* 31 U.S.C. § 703(e)(1), and the removal of an independent counsel requires only the stroke of the Attorney General's pen, while that of the Comptroller General demands a Joint Resolution of both Houses of Congress, subject to presidential veto.[47]

B. There Is No Unconstitutional "Incongruity" in Lodging the Appointment of a Temporary Prosecuting Official in a Court of Law.

Assuming *arguendo* that an independent counsel is an "inferior Officer," the court below went on to void her appointment by the Special Division because "the Constitution generally precludes inter-branch appointments,"

Architect of the Capitol, 40 U.S.C. § 162, an officer within the legislative branch, 2 U.S.C. §§ 60-1(b)(2), 701(e), without any superior other than the Congress itself. This necessarily endorses the view that an "inferior Officer" need not be the subordinate of any other officer.

[47] The majority below rejected the view that the Attorney General can be the "constitutional superior" of an independent counsel, on the ground that he "has essentially only the authority to petition the Special Court to authorize the removal of an independent counsel." J.S. App. 19a. This view, however, rests on the majority's untenable reading of § 596(a)(3). *See* pp. 22-23 *supra*. The Act provides for nothing more than judicial review of the Attorney General's "good cause" determination. And the Court in *Bowsher* declined to decide whether Congress' removal of a Comptroller General would be subject to judicial review, evidently not deeming it of controlling significance. *See* 106 S. Ct. at 3190 & n.8.

and furthermore, "court appointment of prosecutors presents a more fundamental incongruity with our constitutional scheme than virtually any other type of inter-branch appointment." J.S. App. 42a. We answer each proposition in turn.

To begin with, nothing in the language of the Appointments Clause purports to limit Congress' choice of a particular appointing authority for any specific "inferior Officer." Indeed, more than a century ago, this Court found in the language of the Clause a textual commitment of that choice to Congress:

> [A]s the Constitution stands, *the selection of the appointing power, as between the functionaries named, is a matter resting in the discretion of Congress.* And, looking at the subject in a practical light, it is perhaps better that it should rest there, than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise.

Ex parte Siebold, 100 U.S. at 397-98 (emphasis added).[48] On this basis, *Siebold* upheld judicial appointment of fed-

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[48] The position of the majority below ultimately rested on an earlier *dictum* in *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 257-58 (1839), where the Court, in approving judicial appointment and removal of a court clerk, remarked that the constitutional appointment power "was no doubt intended to be exercised by the department of the government to which the officer to be appointed most appropriately belonged." Even the majority below acknowledged that "the impact of this statement was somewhat narrowed by *Ex parte Siebold*." J.S. App. 31a n.23. The constitutional basis of the *Hennen dictum* was, however, squarely rejected by *Siebold*:

> It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. *But there is no absolute requirement to this effect in the Constitution*; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. . . . *The observation in the case of Hennen . . . was not intended to define the*

eral election supervisors, which had been attacked on the ground that their duties were "entirely executive in their character." *Id.* at 397. *Siebold* thus stands squarely for the proposition that there is no general constitutional prohibition on "inter-branch appointments."[49] *See also Go-Bart Importing Co. v. United States*, 282 U.S. 344, 353 n.2 (1931).

There is, moreover, no reason to suppose the Framers would have condoned cross-branch appointment of "principal" officers, but not inferior ones. The most obvious case of appointment by another branch is this Court. This is not a unique exception, however. It has never been doubted that the Constitution permits, and perhaps requires, the appointment of lower federal judges by the President. And no one questions the President's selection of the Comptroller General, an agent of the Congress, as this Court held in *Bowsher*. *See also* 2 U.S.C. § 701(e). Similar cross-branch appointments of concededly "inferior" officers of the legislative or judicial branch are equally beyond challenge if Congress chooses *not* to exercise the option tendered by the proviso of the Ap-

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constitutional power of Congress in this regard, but rather to express the law or rule by which it should be governed.

100 U.S. at 397-98 (emphasis added). Thus the majority's effort to resurrect the *Hennen dictum* as a general constitutional principle runs counter to the holding in *Siebold*.

[49] The majority below sought to distinguish *Siebold* on the ground that it turned on the power of each House of Congress under art. I, § 5, cl. 1, to "be the Judge of the Elections, Returns and Qualifications of its own Members," urging that "Congress presumably could have chosen any method of appointing [the election supervisors] including vesting the appointment power in itself." J.S. App. 36a-37a. This, of course, ignores the issue as framed and decided by the Court in *Siebold*; in any event, it is demonstrably wrong. If the election supervisors were "officers of the United States," as the Court plainly held they were, congressional appointment was forbidden by the Appointments Clause. *Buckley v. Valeo*, 424 U.S. at 125-30.

pointments Clause.[50] It would be strange, indeed, if the Clause must be read to forbid the same result when the legislature expressly foregoes its confirmation power and provides for the appointment of the inferior officer by the President alone.[51] Nor can the Clause be strained to authorize cross-branch appointments by the President or department heads, but not by a court of law. Plainly, there is no general prohibition on cross-branch appointment of inferior officers.

This is not to say that there are no limits whatever. The Court in *Siebold*, while rejecting the attack on "inter-branch" appointments generally and in the case before it, recognized the possibility that not all such appointments might be compatible with the constitutional scheme. A limiting principle was articulated—"incongruity":

> the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void.

Id. at 398.

We may accept *arguendo* that it would be "incongruous" for a court to appoint all the Secretary of Agriculture's subordinates or for the Attorney General to appoint the clerks to federal judges, *see* J.S. App. 39a-40a, but these conclusions do not speak to the problem at hand.[52] Nothing in the few decided cases suggests any

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[50] Two actual examples are the Librarian of Congress and the Public Printer, presumably inferior legislative branch officers, *see* 2 U.S.C. § 701(e), who are appointed by the President with the advice and consent of the Senate, 2 U.S.C. § 136; 44 U.S.C. § 301.

[51] As previously noted, the Architect of the Capitol is appointed by the President alone. 40 U.S.C. § 162.

[52] The majority below repeatedly reasoned *in terrorem* from hypotheticals far removed from the facts of this case. But this Court has recently cautioned against reaching conclusions in concrete separation of powers disputes "out of fear of where some hypotheti-

inherent "incongruity" in judicial appointment of officers exercising "executive" powers. *Siebold* treated the duties of the election supervisors as "entirely executive in their character," 100 U.S. at 397, and lower courts have upheld interim judicial appointment of United States Attorneys, *United States v. Solomon*, 216 F. Supp. at 838-43, and of members of the District of Columbia School Board, *Hobson v. Hansen*, 265 F. Supp. 902, 913-15 (D.D.C. 1967) (3-judge court) (alternative holding).

The majority below argued, however, that court appointment of independent counsels is particularly incongruous "because it blurs that cherished separation of prosecutor and judge which is a crucial aspect of the Constitution's protection of individual liberty." J.S. App. 42a. This is, we submit, a well-turned phrase that both exaggerates the general principle and ignores the particulars of this case. Merely conferring upon a court the duty to appoint a prosecutor—without any power of control or removal—does *not* merge prosecutor and judge. Sufficient proof is the longstanding law that charges district courts with the appointment of interim United States Attorneys, *see Solomon*; Act of Mar. 3, 1863, ch. 93, § 2, 12 Stat. 768, and the equally venerable practice, sustained by this Court in *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124 (1987), under which private attorneys are judicially appointed to prosecute contempts of court. In the first instance, the court's appointive role is merely a matter of convenience; in the second, it was deemed justified by necessity. But there can be no objection to invoking the same mechanism when the purpose is to assure the independence of the prosecutor from the political branches.

This is, indeed, a recurrent theme in Anglo-American history. In England, as the Framers well knew (a number of them having received their legal training at the Inns of Court), the Attorney General has always been

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cal 'slippery slope' may deposit us." *CFTC v. Schor*, 106 S. Ct. 3245, 3258 (1986).

independent of the political government when making prosecutorial decisions. That concept has at least partially survived the Atlantic crossing. Here, too, the prosecutor is expected to be above politics. *See Berger v. United States*, 295 U.S. 78, 88 (1935). *See also United States v. Nixon*, 418 U.S. 683, 694 (1974). One traditional way of furthering that independence, common in eighteenth century America and in many states even today, is to lodge the appointment of the prosecutor in a court of law.[53]

Significantly, the original draft of the First Judiciary Act, primarily the work of Oliver Ellsworth and William Paterson,[54] provided for judicial appointment of the Attorney General and United States Attorneys. *See* J.S. App. 122a-23a n.41; Warren, *supra*, at 108-09. Although the Senate later substituted presidential appointment in both cases,[55] there is not the slightest ground for concluding that this was done on constitutional grounds.[56]

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[53] *E.g.*, 2 Z. Swift, *Digest of the Laws of the State of Connecticut* 369 (1823 ed.); Nat'l Ass'n of Attorneys General, *Powers, Duties and Operations of State Attorneys General* 77-79 (1977); *see, e.g.*, Tenn. Code Ann. § 8-6-101 (1980); Conn. Gen. Stat. §§ 51-275 *et seq.*

[54] See Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 57, 59-63 (1923).

[55] *Id.* at 109 n.137. Although Section 35 of the Judiciary Act as finally enacted, 1 Stat. 92-93, does not expressly specify who appoints the Attorney General and the United States Attorneys, the result of not otherwise providing, according to the Appointments Clause, is that the President has the appointment, subject to Senate confirmation.

[56] Whatever view one takes about the status of "Heads of Departments" as "principal" or "inferior" officers, the Attorney General did not then qualify as such. He had no department, he had no supervision of the United States Attorneys, and he represented the government only in this Court. Judiciary Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 93. Moreover, the salary of the Attorney General was then far below that of the three Department Heads (Foreign Affairs, Treasury and War). Act of Sept. 23, 1789, ch. 18, 1 Stat. 72; Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 67. He ranked well below them and was not deemed a member of the Cabinet. *See*

Indeed, it ought not lightly be assumed that Ellsworth and Paterson, prominent participants in the Constitutional Convention and later Members of this Court, would have overstepped firm boundaries fixed by the Constitution—even by "one line," J.S. App. 35a—or that they would not have been corrected by the three other veterans of the Convention who sat on the Judiciary Committee [57] that reported the bill with the provision for judicial appointment.

It is no accident that, even today, the Attorney General and the Solicitor General are listed as "Officers of the Court" in the official reports of this Court. Unlike other executive department officers, the lawyers of the Department of Justice have a special connection with the courts of law and a duty towards them that sometimes overrides their loyalty to the Administration. Of course, this does not make the prosecutor a subservient agent of the courts. But the special relationship between the judiciary and the bar makes it not inherently inappropriate that judges should sometimes appoint prosecutors—just as every court, including this Court, regularly appoints defense counsel without thereby subverting the lawyer's independence.

A fortiori, there is no "incongruity" in the limited and temporary appointment involved here. The mechanism was devised for reasons not unrelated to those underlying the practice vindicated in *Young*. In this instance, Congress had a powerful reason not to lodge the power of appointment in the Executive Branch, rooted in "the principle that 'no man can be a prosecutor or judge in his own case.'" J.S. App. 110a (Ginsburg, J., dissenting), *quoting* S. Rep. No. 170, 95th Cong., 1st Sess. 5 (1977). This concern with restoring public confidence in the investigation of alleged wrongdoing by high government officials must weigh heavily in the analysis of whether judicial appointment of such officials is unconstitutionally "incongruous." In the circumstances, it seems obvious that vesting appointment of independent counsels in the President "would be incongruous in the extreme, given the purposes of the Act." J.S. App. 123a-24a. Accordingly, constitutionally debarred from assuming the role itself, Congress lodged the power of appointment—if and when requested by the Attorney General—in the only eligible agency, a neutral court of law. That cannot be an improper solution to an infrequent, but acute, embarrassment within the government of the nation.[58]

C. The Powers Granted to the Special Division by Title VI Do Not Contravene the Limitations of Article III.

We deal here with one final point which in large part turns on the Appointments Clause: the holding by the majority below that Article III was violated because the powers conferred on the Division were not judicial, but executive, in nature, and because the Division was improperly entangled in the prosecutorial decision-making process. These conclusions are based on the majority's wholly unnecessary and unacceptably broad construction of the Division's powers. *See* pp. 21-24 *supra*. In fact, the Division performs only two principal tasks under the statute as it now applies to appellant and this investigation: (1) it chooses the individual who conducts the in-

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Act of Mar. 2, 1799, ch. 38, 1 Stat. 729; L. Huston, *Roles of the Attorney General* 4 (1968). Accordingly, it seems almost certain that, at the time, the Attorney General was viewed as an "inferior Officer," whose appointment could be lodged in this Court, unless the result was "incongruous."

[57] Warren, *supra*, at 57. *See also* 1 *Annals of Congress* 18; *Journal of the Senate*, 1st Sess. 10 (1820).

[58] It should be stressed that Title VI guards against the "blur[ring of the] cherished separation of prosecutor and judge" by rendering members of the Division ineligible to sit in review of any actions of an independent counsel, 28 U.S.C. § 49—a protection not found in the statute upheld in *Solomon*, but on which the Court in *Young* placed major reliance, *see* 107 S. Ct. at 2133, *citing In re Oliver*, 333 U.S. 257 (1948).

vestigation and possible prosecution that the Attorney General has found warranted; and (2) it defines the jurisdiction of the independent counsel, within the parameters set by the Attorney General's prior decisions and his application.[59] Neither of these powers does violence to the limitations of Article III.

First, the Division operates under the Act, not exclusively as an Article III court, but as an appointing agency vested with powers by Congress under the Appointments Clause. The specific authorization in art. II, § 2, cl. 2 must take precedence over the more general limitations which may inhere in the provisions of Article III and the concept of separation of powers. *United States v. Solomon*, 216 F. Supp. at 840-41; *see, e.g., Palmore v. United States*, 411 U.S. 389 (1973).[60] Nor should the appointing function be too narrowly understood. At least in the present context, the Appointments Clause permits the court to go beyond the mere naming of an officer and to define his jurisdiction, in the limited way provided by § 593(b). As Judge Ginsburg put it:

> When an appointment is made to a preexisting office, the title of the office may be all that is needed to define the duties of the new appointee. But where a statute provides for ad hoc appointments, such that the office itself must be defined at the time of appointment, the power to define is a necessary incident of the power to appoint.

J.S. App. 125a (footnote omitted).[61]

[59] Upon the motion of the Attorney General, or its own motion, the Division also has the power (never yet called into play) to terminate the office upon a finding that its work has been substantially completed. See pp. 8, 23-24 *supra*.

[60] This is in no way inconsistent with the teaching of cases such as *United States v. Ferreira*, 54 U.S. (13 How.) 40 (1851), and *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792), relied upon by the majority below, J.S. App. 37a, 77a, holding that Congress may not as a general matter vest courts sitting under Article III with "executive or administrative duties of a nonjudicial nature," *Buckley v. Valeo*, 424 U.S. at 123. Those decisions were not addressing the express authorization of the Appointments Clause.

In any event, the very limited powers assigned to the Division in Title VI—other than the naming of the independent counsel—do not arguably infringe Article III's limitations on the judicial power.

Federal courts sitting under Article III exercise extensive supervisory powers over the conduct of criminal proceedings, frequently on the basis of *ex parte* applications by prosecuting authorities—as for search and arrest warrants—and have done since the beginning of the Republic. *See also, e.g.*, 18 U.S.C. §§ 2516, 2518 (applications to court for approval of electronic surveillance). Moreover, in the early days of the nation, the courts' exercise of the power to charge the grand jury constituted a potent means of controlling the course of law enforcement.

Finally, the courts possess broad powers to initiate prosecutions for contempt of court, including the power to refer such matters to the United States Attorney or to appoint private counsel to prosecute the matter where appropriate. *See* Fed. R. Crim. P. 42; *Young v. United*

[61] *See also Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 545 (9th Cir.) (*en banc*) (Kennedy, J.), *cert. denied*, 469 U.S. 824 (1984). Similarly, identifying the organizational unit of the Executive Branch to which independent counsel will belong for purposes of application of conflict-of-interest laws—complained of by the majority below, J.S. App. 80a—is a proper incident of the process of definition of the office and designation of a person to fill it. *See id.* at 125a n.46.

Likewise, the hitherto unexercised power to terminate the office upon a finding of substantial completion of its mission, 28 U.S.C. § 596(b)(2), may properly be viewed as an incident of the power to appoint. It is likely, in any event, to be exercised, if ever, only in the context of an adversarial proceeding, in which both the independent counsel and the Attorney General, not to mention potential targets, would be heard, thus satisfying the requirements of art. III. *See* J.S. App. at 126a & n.48.

States ex. rel. Vuitton et Fils S.A. At a minimum, *Young* stands for the proposition that there is no inherent violation of Article III in a court playing a limited role in the invocation of the criminal process and the definition of the bounds of an investigation.

In sum, the limited powers exercised by the Division under Title VI do not differ in substance from those which courts sitting under Article III have traditionally enjoyed.[62]

III. TITLE VI DOES NOT VIOLATE THE SEPARATION OF POWERS PRINCIPLE.

The conclusion that lodging the appointment of the independent counsel in a court of law is authorized by the Appointments Clause goes far to answer the claim that Title VI violates Article III. It likewise refutes many of the arguments advanced under the banner of separation of powers. It surely will be a rare case when the Constitution must be read to take back with one hand what it gave with the other.

What remains, then, is to consider whether *other* aspects of Title VI—beyond the appointment formula—offend the separation of powers principle, either by impermissibly aggrandizing the prerogatives of the Legislative or Judicial Branches or by unduly diminishing the powers of the executive.

A. Title VI Involves No Aggrandizement of Congressional or Judicial Power at the Expense of the Presidency.

Where this Court has invalidated congressional or presidential action under the separation of powers doc-

[62] The majority below rejected appellant's reliance on these long-recognized aspects of judicial power on the ground that they dated from "the earliest days of the Republic and it has been assumed that judges may play a role in each." J.S. App. 83a. This begs the question. The contemporary understanding respecting the courts' "inherent" powers over searches, grand juries, etc., surely bears upon the proper definition of "judicial power" under art. III, which the majority concluded was violated by Title VI.

trine, it generally has found, not merely a limitation or displacement of some peculiarly executive or legislative or judicial prerogatives, but the assertion by one branch of the right to exercise, or to control the exercise, of powers normally allotted to another.[63] In each of these important decisions, the Court acted to prevent such "poaching," the aggrandizement of authority by one branch at the expense of another. Title VI works no such transfer of power. Congress has not reserved for itself any role in the invocation of the statutory process, the appointment of an independent counsel, the designation of investigative targets, the definition of the counsel's jurisdiction, the conduct of the investigation, the decision whether to seek an indictment, or the removal of an independent counsel.[64] The legislature has no power under the Act other than the power of oversight, 28 U.S.C. §§ 595(a), (d), the exercise of which with respect to law enforcement activities has been broadly

[63] *See Myers v. United States*, 272 U.S. 52 (1926) (Senate veto of removals of postmasters interfered with President's power to control performance of executive officers); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952) (President's seizure of steel mills to avert wartime strike usurped Congress' legislative power); *Wiener v. United States*, 357 U.S. 349 (1958) (President could not diminish, through assertion of removal power, independence of the War Claims Commission); *Buckley v. Valeo*, 424 U.S. 1, 126-32, 138 (1976) (Congress improperly reserved to itself, in contravention of Appointments Clause, power to appoint officers exercising law enforcement functions); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 83-84 (1982) (opinion of Brennan, J.) (Congress sought in Bankruptcy Act to aggrandize its power at expense of judiciary by granting to non-Article III courts jurisdiction to adjudicate traditional common-law actions); *INS v. Chadha*, 462 U.S. 919, 954-55 (1983) (Congress sought to permit exercise of legislative power without bicameral action or presentation to the President); *Bowsher v. Synar*, 106 S. Ct. 3181, 3187-89 (1986) (Congress vested final executive powers in Comptroller General, its own agent, whom it could remove).

[64] Except through the constitutionally defined power of impeachment, 28 U.S.C. § 596(a)(1), which applies to all officers of the United States.

upheld by this Court, *see McGrain v. Daugherty*, 273 U.S. 135 (1927).

Nor does the Act transfer to the Division any law enforcement powers traditionally reserved to the Executive Branch, save the power to designate the individual to conduct the investigation and possible prosecution, which is expressly authorized by the Appointments Clause. The Division may not appoint an independent counsel without an application by the Attorney General, or grant prosecutorial jurisdiction which has been rejected by him, or control the conduct of the investigation. Nor may it direct the independent counsel to bring a prosecution. *Cf. United States v. Cox*, 342 F.2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965). It cannot remove an independent counsel,[65] it may not sit in review on any matter involving the independent counsel, and under the 1987 amendments it is precluded from hearing an action for reinstatement following removal by the Attorney General.

Thus the legislation does not aggrandize the power of either Congress or the judiciary at the expense of the presidency in the way which has prompted this Court to act in prior cases.

B. Title VI Does Not Impermissibly Interfere With the Operation of the Executive Branch.

Where the element of aggrandizement is absent, the question is whether "Congress impermissibly undermined . . . the role of [a coordinate] Branch." *CFTC v. Schor*,

[65] The Division's authority to terminate the office of an independent counsel on the motion of the Attorney General or its own, upon a finding of substantial completion of the office's tasks, 28 U.S.C. § 596(b)(2), was, we have shown, misread by the majority below to permit the Division "to abolish the office whenever two of the judges believe her investigation no longer serves a useful purpose." See pp. 23-24 *supra*. This is not the equivalent of a removal power, and it may not be exercised whenever the Division disagrees with the conduct of an independent counsel. It requires a specific finding of substantial completion of the tasks of the office.

106 S. Ct. 3245, 3261 (1986). In *Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977), the Court suggested a two-step analysis for "determining whether [an Act of Congress] disrupts the proper balance between the coordinate branches":

> the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

We follow that approach here.

1. *The Act Does Not Prevent the Executive Branch From Accomplishing Its Constitutionally Assigned Functions.*

Essentially, Title VI is said impermissibly to encroach on the prerogatives of the Executive Branch in two ways: (1) that control over a category of criminal prosecutions is removed from the chain of command that ends with the President; and (2) that the independent counsel to whom this "core" executive function is assigned is improperly exempted from the President's constitutional prerogative to fire officers within the Executive Branch at pleasure. We confront the broader claim first and then briefly address the argument concerning removal.

It is undoubtedly true that law enforcement is an executive function, normally undertaken by agents of the President in the discharge of his duty to "take Care that the Laws be faithfully executed." This does not mean, however, that the President must be left free to decide whether he will enforce a given law. *E.g., Kendall v. United States*, 37 U.S. (12 Pet.) 524, 612 (1838); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).[66]

[66] *See also Nat'l Treasury Employees Union v. Nixon*, 492 F.2d 584, 604 (D.C. Cir. 1974) (phrase "does not permit the President to refrain from executing laws duly enacted by Congress"); *ICC v. Chatsworth Coop. Marketing Ass'n*, 347 F.2d 821, 822 (7th Cir.

Nor does it follow that the Constitution excuses the President from respecting congressional decisions incorporated in legislation as to how, and by whom, the law shall be executed. See *Bowsher*, 106 S. Ct. at 3207 (White, J. dissenting); *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting). Provided it does not intrude itself or its agents into the business of enforcement (*Bowsher*) or arrogate to itself the appointment of the enforcers (*Buckley*) or reserve a veto over their removal (*Myers*), Congress may, by measures enacted in the constitutional way, substantially circumscribe executive discretion in the administration of the law.

Our longstanding governmental arrangements—unless they are all unconstitutional—exemplify the various ways in which the Legislative Branch may affect law enforcement. Congress has often, for example, established agencies independent of the President's control. Some of these are in some sense removed from the Executive Branch, *see Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935),[67] while others exist expressly within it.[68] Congress has also provided for citizen lawsuits to supplement government law enforcement efforts,[69] and this Court has developed rules for determining when such private rights of action will be implied, *Cort v. Ash*, 422 U.S. 66 (1975). Citizen involvement in law enforcement extends even to *qui tam* actions, which may be initiated without leave of the government, to collect moneys owed

1965) (law enforcement powers of ICC not inconsistent with this phrase).

[67] *See* 15 U.S.C. § 45 (Federal Trade Commission). *See also, e.g.*, 15 U.S.C. §§ 77*s*-77*u* (Securities & Exchange Commission).

[68] *See, e.g.*, Railroad Retirement Board, 45 U.S.C. §§ 231f(a), 355(f), (g); Renegotiation Board, 50 U.S.C. App. §§ 1217, 1218; Merit Systems Protection Board, 5 U.S.C. §§ 1201-1202, 1205; Special Counsel to the Merit Systems Board, 5 U.S.C. §§ 1204, 1206; Parole Commission, 18 U.S.C. §§ 4202-4203.

[69] *See* 15 U.S.C. § 15; 18 U.S.C. § 1964(c).

the United States (with a percentage reward to the citizen) under the False Claims Act, a criminal statute.[70]

These examples suffice to indicate that the concept of a "unitary executive," stressed by the majority below, J.S. App. 27a, is not a guide for defining the irreducible limit of executive power. There is simply no flat rule that all "executive" business, or all law enforcement duties, must be performed by agents under the direct control of the President or those who serve at his pleasure and act at his direction.

The degree to which Congress may divorce an Executive Branch decision-maker from presidential or secretarial supervision and insulate "administrative" rulings from revision by the President or a department head, depends on the subject matter. Historically, the President's unfettered discretion has been acknowledged in those matters which the Constitution itself assigns to him, the conduct of foreign affairs and the command of the military services. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803); *Humphrey's Executor v. United States*, 295 U.S. at 628; *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 644 (Jackson, J., concurring). *See also* 1 *Annals of Congress* 512 (Rep. Vining), 521-23 (Rep. Page), 614 (Rep. Madison). But it has always been understood that, with respect to other executive business, Congress may devolve the duties upon an independent officer whose decisions cannot be overturned by the President or other higher officials. *E.g., Kendall*, 37 U.S. (12 Pet.) at 610; *Butterworth v. United States ex rel. Hoe*, 112 U.S. 50 (1884); *Myers*, 272 U.S. at 135; *Humphrey's Executor*. *See also* 1 *Annals of Congress* 611-12, 614 (Rep. Madison questioning the President's right to interfere with the Treasury Comptroller's decisions).

[70] *See* 31 U.S.C. § 3730(b)(1); 18 U.S.C. § 287. *See also United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

Nor is there any special exemption for criminal prosecutions. While criminal prosecution is indisputably an "executive"—as opposed to a "legislative" or "judicial"—function, that does not mean that the President is constitutionally entitled to control every exercise of prosecutorial discretion. In discussing the Appointments Clause, pp. 40-41 *supra*, we have already noted the tradition of prosecutorial independence from political direction. We may add that the history of criminal prosecutions here and in England both before and after the adoption of the Constitution lends no support to the proposition that hands-on presidential control of all criminal prosecutions is a *sine qua non* of effective executive power.[71] In the eighteenth century, criminal prosecutions in England and in the Colonies were entrusted to private counsel, as they mostly are in England to this day.[72] Moreover, as Judge Ginsburg pointed out,

> Prosecution was decentralized during the federalist period, . . . and it was conducted by district attorneys who were private practitioners employed on a fee-for-services basis.[73]

Indeed, "it was not until after Reconstruction and the creation of the Department of Justice in 1870 that the various prosecutors came under any meaningful national supervision." [74]

[71] There is nothing to the contrary in *United States v. Nixon*, 418 U.S. 683, 693 (1974), or *United States v. Cox*, 342 F.2d at 190 (Wisdom, J., concurring). *Cox* merely held that a court may not order a prosecutor to proceed with a case by means of the contempt power—which Title VI does not purport to authorize. And in *Nixon* this Court upheld, over the President's constitutional protest, the power of a special prosecutor appointed with solemn assurances of independence from presidential control to compel the President himself to turn over to a grand jury tapes of his confidential conversations with his aides—a holding from which appellees and the majority below can hardly derive comfort.

[72] *See* R. Jackson, *The Machinery of Justice in England* 213 (7th ed. 1977).

[73] J.S. App. 108a, *citing* L. White, *The Federalists: A Study in Administrative History* 406-08 (1948).

It is unnecessary to consider how far Congress might insulate prosecution from political direction. What is clear, we submit, is that Title VI does not unduly encroach on the executive prerogative. We are dealing with a narrowly tailored measure fashioned to achieve a limited objective—the creation of a law enforcement mechanism where the Executive Branch is disabled to act by virtue of a conflict of interest. Its reach is modest, and it preserves substantial Executive Branch power even within its compass. It was enacted only after repeated historical demonstrations of the inability of the Executive Branch to police its own top echelons in a manner consistent with public confidence in the integrity of law enforcement. Congress plainly has the power in these circumstances to create such a mechanism, where it has not in the process expanded its own powers.

The actions of the Executive Branch itself belie the notion that the narrowly crafted provisions of Title VI disrupt the performance of its constitutionally assigned functions. While the Justice Department has recently joined the attack upon the statute, the Department initially supported it,[75] and Presidents Carter and Reagan

[74] 3 *Encyclopedia of Crime & Justice* 1291 (Kadish ed. 1983); *see* H. Cummings & C. McFarland, *Federal Justice: Chapters in the History of Justice and the Federal Executive* 143-46, 225-26 (1937).

The Judiciary Act of 1789 gave the Attorney General no power of supervision over the various district attorneys, as United States Attorneys were then called. Such supervisory power as existed was lodged in the Comptroller General. Act of March 3, 1789, ch. 20, §§ 1-3, 1 Stat. 512-15. Attorney General Randolph requested legislation to authorize him to instruct district attorneys, and President Washington submitted such a proposal to Congress, which did not enact it. L. Huston, *The Department of Justice* 6-8 (1967).

[75] *See* Public Officials Integrity Act of 1977: Hearings on S. 555 Before the Senate Comm. on Governmental Affairs, 95th Cong., 1st Sess. 8, 15-17 (1977) (testimony of Acting Ass't Atty. Gen. John M. Harmon).

have signed it into law, the latter twice.[76] Agreement between the President and Congress certainly does not tie the hands of the courts, but at least where the question is whether a statute impermissibly strips the Executive Branch of its fundamental prerogatives, the executive's assent is entitled to substantial weight in the judicial analysis. *See Myers v. United States*, 272 U.S. at 254-59 (Brandeis, J., dissenting); *cf. Nixon v. Administrator of General Services*, 433 U.S. at 441. Furthermore, Presidents since Calvin Coolidge have taken action to divest themselves of law enforcement responsibility in criminal matters affecting high administration officials.[77] Indeed, the Attorney General has promulgated regulations under which independent counsels previously appointed under the statute may be—and have been—reappointed to conduct precisely the same investigations with precisely the same insulation from presidential removal as they had under the Act. *See* 28 C.F.R. Part 600; 52 Fed. Reg. 7270 (1987). It does not seem likely that successive administrations would have acted in this manner if direct control by the President and Attorney General of prosecutions of high government officials were truly essential to the preservation of Executive Branch prerogatives.

Despite the views of the majority below, *see* J.S. App. 42a-53a, the Act's restrictions on the Attorney General's removal power do not violate the separation of powers.[78]

A major strand of this Court's separation of powers jurisprudence involves the power to remove government

[76] President Carter called the legislation "necessary in response to the lessons that we have learned to the embarrassment of our country in the past." 14 Weekly Comp. Pres. Doc. 1855 (Oct. 26, 1978).

[77] *See* note 28 *supra* and accompanying text.

[78] We have already dealt with the further objection, J.S. App. 55a-56a, that the provision for a civil action for reinstatement afforded to a removed independent counsel renders the Division "a 'superior and revising agency' with a veto over the Attorney General's decision." *See* pp. 21-24 *supra*.

officials, *see Myers v. United States*, 272 U.S. 52 (1926); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Wiener v. United States*, 357 U.S. 349 (1958); *Bowsher v. Synar*, 106 S. Ct. 3181 (1986), on the view that "once an officer is appointed, it is only the authority that can remove him . . . that he must fear and, in the performance of his functions, obey," *Bowsher*, 106 S. Ct. at 3188. The teaching of these cases, however, is simply that the power to remove an Executive Branch officer cannot be transferred, in whole or in part, to the Congress. They emphatically do not hold unconstitutional a mere congressional restriction on the executive's power of removal that adds nothing to legislative prerogatives.

Indeed, the decision most jealously defending the rights of the executive, *Myers*, expressly recognized that there is no constitutional objection to such a brake on dismissal of "inferior" executive officers, so long as "Congress [does not] draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power." 272 U.S. at 160-62. This was consistent with the earlier ruling in *United States v. Perkins*, 116 U.S. 483, 485 (1886), and was unanimously reaffirmed in *Humphrey's Executor* and *Wiener*. The rule remains undisturbed.[79]

Title VI plainly meets the test laid down in these precedents. Albeit restricted, the removal power remains in the Attorney General, and Congress has reserved to itself no role in the removal process. Here Congress has, with ample justification, concluded that the public interest demands the creation of a law enforcement mechanism "free from executive control," *Humphrey's Executor*, 295 U.S. at 628, to deal with the recurring problem of allegations

[79] *Bowsher* did not resurrect the theory found in *dicta* in *Myers* that the President must possess unfettered power either to remove or to direct the performance of any officer exercising "executive" or "law enforcement" powers. The Solicitor General made precisely this argument in *Bowsher*, but as Justice White pointed out, the Court was careful not only to avoid any such implication, but to reaffirm the vitality of *Humphrey's Executor* and *Wiener*. 106 S. Ct. at 3206 (White, J., dissenting); *see id.* at 3188 n.4.

of criminal misconduct against high government officials, and that that mechanism can function effectively only if certain limitations are placed upon the power of the Executive Branch to remove the officer temporarily in charge of it. The Constitution is not offended by such an arrangement.

2. *Any Impact on Executive Branch Powers Is Justified by an Overriding Need To Promote an Objective Within the Constitutional Authority of Congress.*

Assuming *arguendo* that the Act creates some potential for disruption of the functioning of the Executive Branch, it nonetheless clearly passes the second prong of the *Nixon* test.

No one suggests that it is beyond the constitutional authority of Congress to attempt to ensure that the criminal laws will be applied to high government officials in a fair and even-handed manner that will secure public confidence in the integrity of the process. The constitutional crisis that grew out of Watergate is a sufficient demonstration that without a mechanism to achieve this goal, there is real question whether we are in fact "a Nation capable of governing itself effectively." *Buckley v. Valeo*, 424 U.S. at 121.[80]

The achievement of both the fact and the appearance of fairness in the prosecutorial process is essential to ef-

[80] The majority below brushed this argument aside, pointing to the impeachment power, which, it said, "grants to Congress the power, if needed because of criminal behavior, to discipline the President and all of his appointees." J.S. App. 63a. But the existence of the impeachment power does not deprive Congress of the power to enact appropriate legislation designed to avert unseemly and destructive confrontations between the legislature and the executive. Our two experiences with presidential impeachments have more than amply demonstrated the grave national crises to which such proceedings inevitably give rise and the enormous energies that are expended. To suggest that Congress has no room for action short of such proceedings to remedy a recurrent problem of public confidence in the integrity of law enforcement is wholly untenable.

fective law enforcement and hence to effective government in a free society. This Court has repeatedly emphasized that a federal prosecutor

> is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all. . . . As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

Berger v. United States, 295 U.S. 78, 88 (1935). Only last Term the Court held that the need for a disinterested prosecutor bars the appointment of a lawyer with a potential conflict of interest to investigate and prosecute a criminal contempt of court. *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. 2124, 2135-41 (1987). The Court deemed the point so fundamental that it declined to apply harmless error analysis. *Id.* at 2138-41.

The present case affords the paradigm of a conflict on the part of the Attorney General and the Department, for the subject of the investigation is a former high-level Justice Department official, and the investigation concerns allegations of improprieties pervading the Department's conduct in a serious confrontation with the Legislative Branch. Nothing said by the majority below suggests that the fact and the appearance of fairness can be achieved in these circumstances by an investigation conducted or controlled by the Department.

C. Title VI Poses No Threat to Individual Liberties.

The majority below perceived a threat to personal liberty from Title VI in three respects: (1) viewing the independent counsel as "free to ignore Department of Justice policy" regarding criminal prosecutions, it concluded that "targets of an independent counsel may be subjected to investigations and prosecutions governed by rules different from those that apply to the investigation of any other citizen," J.S. App. 57a; (2) it deemed an

independent counsel unaccountable to anyone and burdened by "unique incentives to seek an indictment," *id.* at 70a; and (3) what it termed the "intimate involvement of an Article III court in the supervision and control of a prosecutorial office," in its view "undermines the status of the judiciary as a neutral forum for the resolution of disputes between citizens and their government," *id.* at 85a. The first and third of these concerns are based on the majority's incorrect reading of the statute. *See* pp. 19-24 *supra*.

An independent counsel is *not* "free to ignore" Justice Department policies; there is no suggestion that *this* independent counsel has "ignored" or violated any Justice Department policy; and any target or defendant being investigated or prosecuted by an independent counsel remains free to complain of any such violations which affect his rights, every bit as much as if the violation was committed by a United States Attorney. Any unjustified departure from Justice Department policy can be brought to the attention of the Attorney General, who could determine whether it constituted "good cause" for the removal of an independent counsel, or to the attention of the district court in the context of a prosecution, where it might be deemed prosecutorial misconduct subject to judicial remedy.

Nor is the Division "intimately involve[d] . . . in the supervision and control of a prosecutorial office." *See* pp. 21-24 *supra*. Moreover, the Division's statutory isolation from review of any of the actions of an independent counsel—cemented by the 1987 amendments to § 596(a)(3)—enhances rather than undermines the "status of the judiciary as a neutral forum." There is not a shred of evidence that defense counsel have been reluctant to attack the conduct of proceedings by independent counsels, or that district and circuit judges have been inhibited to rule against independent counsels, where appropriate.[81]

[81] In addition to the decision below, *see In re Sealed Case*, 832 F.2d 1268 (D.C. Cir. 1987). Moreover, the district court in the *Deaver* prosecution, in perhaps the most celebrated *contretemps* to date in a prosecution by an independent counsel, denied the independent counsel leave to subpoena the Canadian Ambassador. *See United States v. Deaver*, Crim. No. 87-096 (D.D.C. June 23, 1987).

The notion that an independent counsel is either unaccountable or motivated by "unique incentives to seek an indictment" is equally chimerical. An independent counsel is accountable to the Attorney General, who may remove him for "good cause," and to the court before which he brings an indictment to be tried to the same extent as any other prosecutor. An independent counsel must, moreover, file a complete report of his activities with the Division and must cooperate with congressional oversight proceedings.[82] This inevitably intense scrutiny, far from creating "unique incentives to seek an indictment," is likely to encourage great caution by an independent counsel in pursuing prosecutions. In any event, the majority cited no evidence whatever for its conclusion that an independent counsel will need to justify his existence by bringing an indictment, J.S. App. 71a, and it ignored the history of investigations under the Act, which have produced only two indictments, both of which have resulted in convictions.

The court below also ignored the substantial benefits that Congress sought to confer upon high government

[82] The majority below complained that the statutory process is unaccountable to the electorate. J.S. App. 27a. Yet the Act is carefully crafted both to restrain any hint of congressional control of the activities of an independent counsel and to provide for continual review of its functioning and utility by elected officials. Congress has no role in invoking the statute, appointing an independent counsel, supervising his activities, or removing him. Yet the Act's oversight provisions and Congress' refusal on three occasions to make the enactment permanent, give to the electorate an ongoing review of the need for the legislation and the practical functioning of the system. If the results are, in the majority's words, "contrary to the mores of the community, the community has a visible target for its grievances," J.S. App. 27a: it can demand that the legislation not be renewed.

officials accused of crime: the isolation of the process from the pressure on the Attorney General to demonstrate his lack of favoritism, and the greater reputational impact of a refusal to prosecute by one who has no ties to the incumbent Administration.

One who is the subject of scrutiny by an independent counsel retains the full panoply of rights afforded by the Constitution, statutes and rules governing criminal law enforcement—freedom from unreasonable search and seizure and compulsory self-incrimination; the requirement of a grand jury indictment; a trial by a constitutionally selected jury before a neutral judge wholly unconnected with the independent counsel's activities.

In short, the Act removes none of the essential safeguards to liberty of our criminal justice system; to the contrary, by isolating the investigative and prosecutorial funtcions from the pressures of partisan politics, it affords those under scrutiny and the public that "confidence in the disinterested conduct" of the prosecutor which is "essential" in our system. *Young v. United States ex rel. Vuitton et Fils S.A.*, 107 S. Ct. at 2141.

CONCLUSION

For the foregoing reasons the decision below should be reversed and the judgments of contempt affirmed.

Respectfully submitted,

ALEXIA MORRISON
Independent Counsel
(Counsel of Record)
EARL C. DUDLEY, JR.
RICHARD C. OTTO
Deputy Independent Counsel
2600 Virginia Avenue, N.W.
Washington, D.C. 20037

LOUIS F. CLAIBORNE
Appellate Counsel
Counsel for Appellant

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APPENDIX

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Article II, § 2, of the United States Constitution, provides as follows:

> SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.
>
> He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
>
> The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Article III, §§ 1 and 2, of the United States Constitution, provide as follows:

> SECTION 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time

to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The following sections of Title VI of the Ethics in Government Act of 1978, were amended in 1987, with immediate application to sitting independent counsels, by Pub. L. No. 101-191, 101 Stat. 1293 (1987).

Section 593(f) ATTORNEYS' FEES.—

(1) AWARD OF FEES.—Upon the request of an individual who is the subject of an investiga-

tion conducted by an independent counsel pursuant to this chapter, the division of the court may, if no indictment is brought against such individual pursuant to that investigation, award reimbursement for those reasonable attorneys' fees incurred by that individual during that investigation which would not have been incurred but for the requirements of this chapter. The division of the court shall notify the Attorney General of any request for attorneys' fees under this subsection.

(2) EVALUATION OF FEES.—The division of the court may direct the Attorney General to file a written evaluation of any request for attorneys' fees under this subsection, analyzing for each expense—

(A) the sufficiency of the documentation;

(B) the need or justification for the underlying item; and

(C) the reasonableness of the amount of money requested.

Section 594(d)(2) PAYMENT OF AND REPORTS ON EXPENDITURES OF INDEPENDENT COUNSEL.—The Department of Justice shall pay all costs relating to the establishment and operation of any office of independent counsel. The Attorney General shall submit to the Congress, not later than 30 days after the end of each fiscal year, a report on amounts paid during that fiscal year for expenses of investigations and prosecutions by independent counsel. Each such report shall include a statement of all payments made for activities of independent counsel but may not reveal the identity or prosecutorial jurisdiction of any independent counsel which has not been disclosed under section 593(b)(4).

Section 594(h) REPORTS BY INDEPENDENT COUNSEL.—

(1) REQUIRED REPORTS.—An independent counsel shall—

(A) file with the division of the court, with respect to the 6-month period beginning on the date of his or her appointment, and with respect to each 6-month period thereafter until the office of that independent counsel terminates, a report which identifies and explains major expenses, and summarizes all other expenses, incurred by that office during the 6-month period with respect to which the report is filed, and estimates future expenses of that office.

Section 594(i) INDEPENDENCE FROM DEPARTMENT OF JUSTICE.—Each independent counsel appointed under this chapter, and the persons appointed by that independent counsel under subsection (c), are separate from and independent of the Department of Justice for purposes of section 202 through 209 of title 18.

Section 594(j) STANDARDS OF CONDUCT APPLICABLE TO INDEPENDENT COUNSEL, PERSONS SERVING IN THE OFFICE OF AN INDEPENDENT COUNSEL, AND THEIR LAW FIRMS.—

(1) RESTRICTIONS ON EMPLOYMENT WHILE INDEPENDENT COUNSEL AND APPOINTEES ARE SERVING.—(A) During the period in which an independent counsel is serving under this chapter—

(i) such independent counsel, and

(ii) any person associated with a firm with which such independent counsel is associated,

may not represent in any matter any person involved in any investigation or prosecution under this chapter.

(B) During the period in which any person appointed by an independent counsel under subsection (c) is serving in the office of independent counsel, such person may not represent in any matter any person involved in any investigation or prosecution under this chapter.

(2) POST EMPLOYMENT RESTRICTIONS ON INDEPENDENT COUNSEL AND APPOINTEES.—(A) Each independent counsel and each person appointed by that independent counsel under subsection (c) may not, for 3 years following the termination of the service under this chapter of that independent counsel or appointed person, as the case may be, represent any person in any matter if that individual was the subject of an investigation or prosecution under this chapter that was conducted by that independent counsel.

(B) Each independent counsel and each person appointed by that independent counsel under subsection (c) may not, for 1 year following the termination of the service under this chapter of that independent counsel or appointed person, as the case may be, represent any person in any matter involving any investigation or prosecution under this chapter.

(3) ONE-YEAR BAN ON REPRESENTATION BY MEMBERS OF FIRMS OF INDEPENDENT COUNSEL.—Any person who is associated with a firm with which an independent counsel is associated or becomes associated after termination of the service of that independent counsel under this chapter may not, for 1 year following such termination, represent any person in any matter in-

volving any investigation or prosecution under this chapter.

(4) DEFINITIONS.—FOR PURPOSES OF THIS SUBSECTION—

(A) the term 'firm' means a law firm whether organized as a partnership or corporation; and

(B) a person is 'associated' with a firm if that person is an officer, director, partner, or other member or employee of that firm.

Section 594(k) CUSTODY OF RECORDS OF AN INDEPENDENT COUNSEL.—

(1) TRANSFER OF RECORDS.—Upon termination of the office of an independent counsel, that independent counsel shall transfer to the Archivist of the United States all records which have been created or received by that office. Before this transfer, the independent counsel shall clearly identify which of these records are subject to rule 6(e) of the Federal Rules of Criminal Procedure as grand jury materials and which of these records have been classified as national security information. Any records which were compiled by an independent counsel and, upon termination of the independent counsel's office, were stored with the division of the court or elsewhere before the enactment of the Independent Counsel Reauthorization Act of 1987, shall also be transferred to the Archivist of the United States by the division of the court or the person in possession of such records.

(2) MAINTENANCE, USE, AND DISPOSAL OF RECORDS.—Records transferred to the Archivist under this chapter shall be maintained, used,

and disposed of in accordance with chapters 21, 29, and 33 of title 44.

(3) ACCESS TO RECORDS.—

(A) IN GENERAL.—Subject to paragraph (4), access to the records transferred to the Archivist under this chapter shall be governed by section 552 of title 5.

(B) ACCESS BY DEPARTMENT OF JUSTICE.—The Archivist shall, upon written application by the Attorney General, disclose any such records to the Department of Justice for purposes of an ongoing law enforcement investigation or court proceeding, except that, in the case of grand jury materials, such records shall be so disclosed only by order of the court of jurisdiction under rule 6(e) of the Federal Rules of Criminal Procedure.

(C) EXCEPTION.—*Notwithstanding* any restriction on access imposed by law, the Archivist and persons employed by the National Archives and Records Administration who are engaged in the performance of normal archival work shall be permitted access to the records transferred to the Archivist under this chapter.

(4) RECORDS PROVIDED BY CONGRESS.—Records of an investigation conducted by a committee of the House of Representatives or the Senate which are provided to an independent counsel to assist in an investigation or prosecution conducted by that independent counsel—

(A) shall be maintained as a separate body of records within the records of the independent counsel; and

(B) shall, after the records have been transferred to the Archivist under this chapter, be made available, except as provided in paragraph (3)(B) and (C), in accordance with the rules governing release of the records of the House of Congress that provided the records to the independent counsel.

Subparagraph (B) shall not apply to those records which have been surrendered pursuant to grand jury or court proceedings.

Section 596(a)(3) JUDICIAL REVIEW OF REMOVAL.—An independent counsel removed from office may obtain judicial review of the removal in a civil action commenced in the United States District Court for the District of Columbia. A member of the division of the court may not hear or determine any such civil action or any appeal of a decision in any such civil action. The independent counsel may be reinstated or granted other appropriate relief by order of the court.

Section 596(c) AUDITS.—After the termination of the office of an independent counsel, the Comptroller General shall conduct an audit of the expenditures of that office, and shall submit to the appropriate committees of the Congress a report on the audit.

§ 599. Termination of effect of chapter

This chapter shall cease to be effective five years after the date of the enactment of the Independent Counsel Reauthorization Act of 1987, except that this chapter shall continue in effect with respect to then pending matters before an independent counsel that in the judgment of such counsel require such continuation until that independent counsel determines such matters have been completed.

Other Effective Amendments

SEC. 3. STATUS OF INDEPENDENT COUNSEL AS A SPECIAL GOVERNMENT EMPLOYEE; FINANCIAL DISCLOSURE REQUIREMENTS.

(a) AMENDMENT TO TITLE 18.—The first sentence of section 202(a) of title 18, United States Code, is amended—

(1) by striking out "or" after "United States commissioner" and inserting in lieu thereof a comma; and

(2) by striking out the period at the end of the sentence and inserting in lieu thereof the following: ", or, regardless of the number of days of appointment, an independent counsel appointed under chapter 40 of title 28 and any person appointed by that independent counsel under section 594(c) of title 28."

(b) FINANCIAL DISCLOSURE REQUIREMENTS.—

(1) FILING OF REPORTS.—Section 203(b) of the Ethics in Government Act of 1978 is amended by striking out "and the Vice President" and inserting in lieu thereof ", the Vice President, and independent counsel and persons appointed by independent counsel under chapter 40 of title 28."

(2) LIMITATION ON PUBLIC DISCLOSURE.—(A) Section 203(d) of the Ethics in Government Act of 1978 is amended by inserting before the period at the end thereof the following: ", except that any report filed by an independent counsel whose identity has not been disclosed by the division of the court under chapter 40 of title 28, and any report filed by any person appointed by that independent counsel under such

chapter, shall not be made available to the public under this title."

(B) Section 205(a) of the Ethics in Government Act of 1978 is amended by striking out "Each" in the first sentence and inserting in lieu thereof "Except as provided in section 203(d) of this Act, each."

SEC. 4. CLERK OF THE DIVISION OF THE COURT.

Section 49(a) of title 28, United States Code, is amended by adding at the end thereof the following: "The Clerk of the United States Court of Appeals for the District of Columbia Circuit shall serve as the clerk of such division of the court and shall provide such services as are needed by such division of the court."

SEC. 5. TECHNICAL AMENDMENTS.

(a) TITLE 28, UNITED STATES CODE.—Section 49(f) of title 28, United States Code, is amended by striking out "a independent" and inserting in lieu thereof "an independent."

(b) CONTINGENCY FUND.—Section 601(c) of the Ethics in Government Act of 1978 (28 U.S.C. 591 note) is amended by striking out "39 (relating to special prosecutor)" and inserting in lieu thereof "40 (relating to independent counsel)."

SEC. 6. EFFECTIVE DATE.

(a) IN GENERAL.—Subject to subsection (b), the amendments made by this Act take effect on the date of the enactment of this Act.

(b) PENDING PROCEEDINGS.—With respect to any proceeding under chapter 39 of title 28, United States Code (before the redesignation of such chapter as

chapter 40 by section 144(g) of Public Law 99-554), or under chapter 40 of such title (after such redesignation), which is pending on the date of the enactment of this Act, the following shall apply:

(1) Except as provided in paragraphs (2) and (3), the provisions of chapter 40 of such title as in effect on the day before such date of enactment shall, in lieu of the amendments made by this Act, continue to apply on or after such date to such proceeding until such proceeding is terminated in accordance with such chapter.

(2) The following provisions shall apply to such proceeding on or after such date of enactment:

(A) Section 593(f) of title 28, United States Code, as amended by section 2 of this Act, relating to the award of attorneys' fees.

(B) Section 594(d)(2) of such title, as added by section 2 of this Act, to the extent that such section 594(d)(2) relates to reports by the Attorney General on expenditures by independent counsel, except that the first such report shall be made only with respect to expenditures on or after the date of the enactment of this Act.

(C) Section 594(h)(1)(A) of such title, as added by section 2 of this Act, relating to reports by independent counsel, except that the 6-month periods described in such section 594(h)(1)(A) shall be calculated from the date of the enactment of this Act.

(D) Section 594(i) of such title, as added by section 2 of this Act, relating to

the independence of the office of independent counsel for certain purposes.

(E) Section 594(k) of such title, as added by section 2 of this Act, relating to custody of records of independent counsel.

(F) Section 596(a)(3) of such title, as amended by section 2 of this Act, relating to judicial review of the removal of an independent counsel from office.

(G) Section 596(c) of such title, as added by section 2 of this Act, relating to audits of expenditures of independent counsel.

(H) The amendments made by section 3 of this Act, relating to the status of independent counsel and their appointees as special government employees and to their financial disclosure requirements.

(3) Section 594(j) of title 28, United States Code, as added by section 2 of this Act, relating to certain standards of conduct shall, 90 days after the date of the enactment of this Act, apply to a pending proceeding described in this subsection.